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A TREATISE ON THE
LAW OF PUBLIC CONTRACTS

A TREATISE ON THE LAW
OF
PUBLIC CONTRACTS

BY
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PREFACE

In the leisure hours which fell to my lot in the occupancy of public office, I undertook to gather notes upon the law of Public Contracts. The practice of my profession had brought me in close contact with this phase of the law in representing contractors for subways, railroads, reservoirs, roads, and other public works. I appreciated from experience the difficulty of ascertaining the law affecting this subject and set to work in idle hours to codify it somewhat for my own benefit.

As I proceeded with my work it occurred to me that no book had been written on the law of Public Contracts and so I entered upon the task of gathering together for the benefit of the profession all of the principles relating to the subject. I have done this largely in the hope that this work might prove a vade mecum for counsel to governmental bodies, municipal corporations, and public contractors.

The method by which I proceeded, wherever this was possible, was to state the general principle affecting the particular subject in hand, then to state the subsidiary principles or exceptions to the rule, and lastly to illuminate these, when possible, by appropriate illustrations. In the examination of thousands of cases I have selected those best illustrating the text and have not attempted to weigh down the footnotes by excessive citation. With very few exceptions every case cited is a public contract case.

The work does not include the subject of governmental or municipal bonds.

PREFACE

I desire to acknowledge my thanks for the kindly criticism and counsel which I received from Mr. Franz Sigel of the New York Bar, who read the work when finished and gave me the benefit of valuable suggestions. My acknowledgment of indebtedness would not be complete without a recognition of the assistance rendered me by Mr. Edward H. Ryan, the librarian of the Bronx County Law Library.

JAMES F. DONNELLY.

New York City, January 19, 1922.

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A TREATISE ON THE LAW OF PUBLIC CONTRACTS

PART I. THE POWER TO CONTRACT

CHAPTER I

KINDS OF POWERS

§ 1. **Inherent Power.**

The nation and the State being sovereigns have inherent power to contract, but that attribute cannot strictly be said to exist in the political subdivisions of the State which are called municipal corporations. Inherent power embodies the idea of permanence and inseparableness. Political subdivisions possess no power to contract. If this power inhered in them as accident does in substance the exercise of what was inherent could not be denied. While many authorities declare that since political subdivisions of the State are bodies corporate and politic, they, therefore, possess and enjoy the same powers which private corporations possess and enjoy,¹ it might more appropriately be said that such power is implied from the grant of other powers as the only suitable and available means of giving expression to or carrying out those powers. The true rule seems to be that municipalities must receive their powers by express grant, or by necessary implication from such express grant, and that they accordingly derive their sole

¹ *Portland Lumbering Co. v. East Portland*, 18 Oreg. 21, 22 Pac. 536; *East Tenn. Univ. v. Knoxville*, 6 Baxt. (Tenn.) 166; *Crawfordsville v. Braden*, 130 Ind. 149, 23 N. E. 849.

source of power from legislative enactment.¹ Municipalities and political subdivisions generally can exercise only such power to contract as is expressly conferred or necessarily implied from or incident to the power expressly conferred or such power as is essential to the carrying out of the declared objects and purposes.² Where, therefore, the power is sought to be derived, because not express, it is rather implied in and incidental to express powers and purposes, than inherent in the corporation. The State has the power to prohibit municipalities from contracting and it may indeed provide another agency to make contracts for them. As matter of instance, the State in the case of the City of New York has provided a separate State agency which makes all subway contracts and leaves the city to appropriate the money to pay the bills which the Public Service Commission contracts.³

§ 2. Express Power.

The express powers of a municipality and particularly its power to contract, are usually set out in the charter granted to it by the State, or in the laws regulating the particular class of municipalities to which it belongs or in the general municipal or county law, although some instances may be cited where rights and powers of municipalities are to be found in special acts. The powers of the State and of the nation to contract are as absolute as sover-

¹ Brooklyn City R. Co. *v.* Whalen, 191 App. Div. 737, 229 N. Y. 570, 128 N. E. 215; Detroit Cits. St. Ry. Co. *v.* Detroit, 110 Mich. 384, 68 N. W. 304, 171 U. S. 48, 43 L. Ed. 67; Saginaw G. L. Co. *v.* Saginaw, 28 Fed. 529; Detroit Cits. S. R. Co. *v.* Detroit, 64 Fed. 628; Long *v.* Duluth, 49 Minn. 280, 51 N. W. 915; Parkhurst *v.* Salem, 23 Oreg. 471, 32 Pac. 304; Ketchum *v.* Buffalo, 14 N. Y. 356.

² Detroit Cits. St. Ry. Co. *v.* Detroit, *supra*.

³ Chap. 4, Laws of 1891 of New York; Chap. 429, Laws of 1907 of New York; Chap. 134, Laws of 1921 of New York; Matter of McAneny, 198 N. Y. App. Div. 205, *aff'd* 232 N. Y. 377.

eignty. These powers, however, are usually delegated to boards, departments, agencies and officers and when so delegated, can only be exercised as granted, the same as in the case of municipalities. But the enumeration of express powers in a statute, including a portion of such powers as are usually implied from powers granted, will not necessarily operate as a limitation of corporate powers, and exclude those not enumerated,¹ although where a statute by specific provisions, and extended detailed statement provides the manner and the only manner in which contracts may be made, this excludes any implied power to contract and all liability on contract can only be express.²

§ 3. Implied Power.

Public bodies authorized to do a particular act have with respect to such act the power to make all contracts which natural persons might make.³ They have all the powers possessed by natural persons, as respects their contracts, except when they are expressly, or by necessary implication, restricted.⁴ A public body may accordingly provide in its contract to purchase on credit, and issue its non-negotiable notes in payment.⁵ But it has no implied power to borrow money for corporate purposes.⁶

Where, therefore, public bodies have certain powers expressly granted to them or certain duties imposed upon them, in the absence of legal restrictions, they possess the implied power to enter into such contracts as are necessary

¹ *Galena v. Corwith*, 48 Ill. 423, 425; *Crawfordsville v. Braden*, 130 Ind. 149, 28 N. E. 849.

² *Wellston v. Morgan*, 65 Ohio St. 219, 62 N. E. 127.

³ *Ketchum v. Buffalo*, 14 N. Y. 356.

⁴ *Galena v. Corwith*, 48 Ill. 423.

⁵ *Ketchum v. Buffalo*, *supra*; *Galena v. Corwith*, *supra*; *Douglass v. Mayor of Virginia City*, 5 Nev. 147.

⁶ *Luther v. Wheeler*, 73 S. C. 83, 52 S. E. 874.

to carry out the express powers and obligations imposed upon them.¹ It is generally accepted that public bodies have the implied power to contract for things which are essential to the proper management of modern communities and which are considered to be in the general public interest and for the general public welfare, such as sanitary measures, the construction of streets and sidewalks,² and their repair,³ the lighting of streets,⁴ and the construction of sewers and this power to contract will readily be inferred from general powers to maintain such works, under a liberal interpretation of powers granted for public purposes. The power to build a sewer, therefore, implies the power to contract to build it.⁵ The power to provide water and lighting confers the power to enter into contracts with individuals for these purposes.⁶ The power to erect waterworks grants by implication the right to repay those who made connections with it the amount expended in so doing.⁷ The power to provide sewers confers the power to contract for sewage disposal outside of the city,⁸ and likewise authority to buy a right of way.⁹ The power to abate nuisances gives power to remove garbage beyond city limits.¹⁰ And of course, in each instance cited, the power to contract with reference to the power-conferred, arises.

¹ *Reed v. Anoka*, 85 Minn. 294, 88 N. W. 981; *Cunningham v. Cleveland*, 98 Fed. 657; *Los Angeles W. Co. v. Los Angeles*, 88 Fed. 720, 730; *Douglass v. Virginia City*, *supra*; *Greenville v. Greenville W. Co.*, 125 Ala. 625, 27 So. 764; *Webb G. Co. v. Worcester*, 187 Mass. 385, 73 N. E. 639; *Scheffbauer v. Kearney*, 57 N. J. L. 588, 31 Atl. 454.

² *Jones v. Camden*, 44 S. C. 319, 23 S. E. 141.

³ *Seitzinger v. Tamaqua*, 187 Pa. St. 539, 41 Atl. 454.

⁴ *Fawcett v. Mt. Airy*, 134 N. C. 125, 45 S. E. 1029; *Crawfordsville v. Braden*, 130 Ind. 149, 28 N. E. 849; *Mauldin v. Greenville*, 33 S. C. 1, 11 S. E. 434.

⁵ *Jones v. Holzapfel*, 11 Okla. 405, 68 Pac. 511.

⁶ *Reed v. Anoka*, 85 Minn. 294, 88 N. W. 981.

⁷ *State ex rel. Crow v. St. Louis*, 169 Mo. 31, 68 S. W. 900.

⁸ *McBean v. Fresno*, 112 Cal. 159, 44 Pac. 358, 31 L. R. A. 794.

⁹ *Coit v. Grand Rapids*, 115 Mich. 493, 73 N. W. 811.

¹⁰ *Kelley v. Broadwell*, 3 Neb. 617, 92 N. W. 643.

But the power to tax does not confer authority to contract to pay one-half of the taxes obtained from disclosing to the public officials certain unassessed personal property belonging to residents liable to be assessed.¹ Nor can a public body spell out the right to engage in the business of plumbing from a grant of power to erect waterworks.² It has no implied power to contract to move improvements affected by the widening of a street, as it may not assume the risk of possible collapse and incident injury to persons, and because it has power to acquire property for the purpose of widening a street will not authorize it to agree to move back a building affected and restore it to its former condition in consideration of dedication of the land needed for the widening.³ Again, authority to sell bonds will not empower a municipality, by implication, to settle a claim for breach of a contract to sell bonds.⁴ The power to contract carries with its exercise the power to insert and impose reasonable restrictions in the contract.⁵ Where a public body has power to grant a franchise upon such terms and conditions as it may prescribe, it may impose such reasonable conditions precedent or subsequent as it may consider necessary or proper including the requirement that the grantee of the franchise shall give a bond conditioned for the speedy erection of the plant by which the franchise is to be exercised.⁶ It may grant a franchise on condition that the rate of fare be not increased, when authorized.

¹ *Grannis v. Blue Earth Co.*, 81 Minn. 55, 83 N. W. 495.

² *Keen v. Waycross*, 101 Ga. 588, 29 S. E. 42.

³ *Wheeler v. Sault Ste. Marie*, 164 Mich. 338, 129 N. W. 685, 35 L. R. A. N. S. 547.

⁴ *Ft. Edward v. Fish*, 156 N. Y. 363, 50 N. E. 973.

⁵ *Salem v. Anson*, 40 Oreg. 339, 67 Pac. 190, 56 L. R. A. 169; *D., L. & W. R. Co. v. Oswego*, 92 N. Y. App. Div. 551; *Phoenix v. Gannon*, 195 N. Y. 471, 88 N. E. 1066; *Knapp v. Swaney*, 56 Mich. 345, 23 N. W. 162; *Capital City B. & P. Co. v. Des Moines*, 136 Iowa, 243, 113 N. W. 835; *New York v. Union News Co.*, 222 N. Y. 263, 118 N. E. 635.

⁶ *Salem v. Anson*, *supra*.

CHAPTER II

WHERE POWER LODGED—LIMITATIONS ON AND EXHAUSTION OF POWER

§ 4. Who Possesses Power.

The general powers conferred upon municipalities exist in the common council, board of aldermen, board of supervisors or other similar governing body, except when delegated by charter or statute to some other body or official, and persons dealing with these public bodies, in respect to a matter within the scope of its general powers, need not go behind the doings of such general governing body, apparently regular, to inquire after preliminary or extrinsic irregularities.¹

But where these powers are devolved by law upon the governing body to make contracts for purposes designated in the statute, the general and precise authority conferred upon it may not in toto be delegated to others.² The governing body cannot in any case delegate to a member or committee functions or prerogatives of a legislative character, or involving the exercise of judgment and discretion,³ although merely ministerial functions may be so delegated.⁴

¹ Moore *v.* Mayor of New York, 73 N. Y. 238, 29 Am. R. 134.

² Birdsall *v.* Clark, 73 N. Y. 73; Thompson *v.* Schermerhorn, 6 N. Y. 92; Chase *v.* Scheerer, 136 Cal. 248, 68 Pac. 768; Bluffton *v.* Miller, 33 Ind. App. 521, 70 N. E. 989.

³ People *ex rel.* Healy *v.* Clean Street Co., 225 Ill. 470, 80 N. E. 298; Jewell Belting Co. *v.* Bertha, 91 Minn. 9, 97 N. W. 424; Phelps *v.* New York, 112 N. Y. 216, 19 N. E. 408; Att'y. Gen. *v.* Lowell, 67 N. H. 198, 38 Atl. 270; Blair *v.* Waco, 75 Fed. 800; Foster *v.* Cape May, 60 N. J. L. 78, 36 Atl. 1089.

⁴ Jewell Belting Co. *v.* Bertha, *supra*; Harcourt *v.* Asbury Park, 62 N. J. L. 158, 40 Atl. 690.

Powers vested in a particular officer can only be exercised by him and not by his subordinates.

§ 5. Limitations on Power.

Whoever deals with the officers of a public body is bound at his peril to take notice of the limitations upon their power and authority, for they can only bind the public body which they represent within the limits of their chartered authority.¹ These officers cannot make a contract which is expressly prohibited by charter or statute and a contract beyond the scope of corporate power is void.² Where a particular manner of contracting is prescribed, the manner is the measure of power and must be followed to create a valid contract.³ And no implied contract can be predicated upon acts of such officers in attempting to make contracts beyond the scope of corporate power.⁴ Provisions of statutes relating to the power to contract, the manner of its exercise, or its terms may not be waived, but must be strictly pursued.⁵

But not only are public bodies required to have authority to contract but they are generally required to have funds available or appropriated to carry out the contract

¹ *Osgood v. Boston*, 165 Mass. 281, 43 N. E. 108; *Bennett v. Mt. Vernon*, 124 Iowa, 537, 100 N. W. 349; *Jewel Belting Co. v. Bertha*, 91 Minn. 9, 97 N. W. 424; *N. J. & N. E. Tel. Co. v. Fire Comm'rs*, 34 N. J. Eq. 117, 34 *Id.* 580; *Taft v. Pittsford*, 28 Vt. 286; *Re Niland*, 113 N. Y. App. Div. 661, 193 N. Y. 180, 85 N. E. 1012.

² *McCoy v. Briant*, 53 Cal. 247; *Weitz v. Des Moines*, 79 Iowa, 423, 44 N. W. 696; *Reeside v. U. S.*, 2 Ct. Cl. 1.

³ *Zottman v. San Francisco*, 20 Cal. 102; *McCoy v. Briant*, *supra*; *Fiske v. Worcester*, 219 Mass. 428, 106 N. E. 1025; *Wellston v. Morgan*, 65 Ohio St. 219, 62 N. E. 127.

⁴ *Winchester v. Redmond*, 93 Va. 711, 25 S. E. 1001; *Black v. Detroit*, 119 Mich. 571, 78 N. W. 660; *St. Louis v. Davidson*, 102 Mo. 149, 14 S. W. 825; *Farwell v. Seattle*, 43 Wash. 141, 86 Pac. 217; *Re Niland*, *supra*.

⁵ *Medina v. Dingleline*, 211 N. Y. 24, 104 N. E. 1118; *Schliess v. Grand Rapids*, 131 Mich. 52, 90 N. W. 700; *Carpenter v. Yeadon Borough*, 208 Pa. 396, 57 Atl. 837.

before it can have any validity.¹ Where such is the provision, no power to award a contract exists in the absence of a prior appropriation.² And when money has been appropriated, no recovery is permitted beyond the amount appropriated or the power to expend limited by law.³ A contract to incur an obligation in excess of existing appropriations for the purpose is illegal and void,⁴ and a like result follows where there is a failure to comply with constitutional limitations on the power to create debts.⁵ If public agents are authorized to contract not to exceed a sum stated, they have no power to contract for a larger sum and this limitation of power binds all dealing with such agents.⁶

The mere fact that funds are available in the form of an unexpended balance in the public treasury arising from a levy for the same purpose in the previous year will not suffice as an appropriation to support an obligation.⁷ But if an appropriation exists and is subsequently exhausted, the supplies ordered upon such existing appropriation will constitute a valid contract.⁸ By special act of Congress it has been provided that none of its acts shall be construed to make an appropriation or to authorize the making of a contract involving the payment of money in excess of the appropriations made by law, unless such act shall in specific terms declare that an appropriation is

¹ *Williams v. New York*, 118 App. Div. 756, 192 N. Y. 541, 84 N. E. 1123; *Bradley v. U. S.*, 98 U. S. 104, 25 L. Ed. 105, aff'g 13 Ct. Cl. 166; *May v. Gloucester*, 174 Mass. 583, 55 N. E. 465; *Johnston v. Phila.*, 113 Fed. 40.

² *Williams v. New York*, *supra*, and cases note 1.

³ *May v. Gloucester*, *supra*.

⁴ *Hurley v. Trenton*, 66 N. J. L. 538, 49 Atl. 518, 67 N. J. L. 350, 51 Atl. 1109.

⁵ *McNeal v. Waco*, 89 Tex. 83, 33 S. W. 322; *Drhew v. Altoona*, 121 Pa. St. 401, 15 Atl. 636.

⁶ *Turney v. Bridgeport*, 55 Conn. 412, 12 Atl. 520; *May v. Gloucester*, *supra*.

⁷ *Neumeyer v. Krakel*, 110 Ky. 624, 62 S. W. 518.

⁸ *Chicago v. Berger*, 100 Ill. App. 158.

made or that a contract may be executed.¹ This negatives any possibility of appropriations by construction or implication. Prohibition has also been levelled against payments which will exceed the value of services already rendered or of articles or supplies delivered in part performance of a contract.² Payments made in violation of this statute are void,³ although payments to a contractor may be made where he has performed, even if the government has received no benefit therefrom.⁴ These and other statutory provisions which form a part of the contract may not be waived but must be adhered to strictly as they are generally accepted as mandatory.⁵ Stipulations or conditions which are merely contractual may be waived.⁶

When the power to contract relates to public improvements, such power is limited by the terms of the legislation under which it proceeds to contract. A failure to comply with these in material matters will make the contract void, especially in the case of improvements to be paid for by local assessment, where a strict interpretation of this rule is enforced.⁷

§ 6. Exhaustion of Power.

The grant of unlimited power by the legislature to a

¹ Sec. 6763, U. S. Compiled Statutes.

² Sec. 6647, U. S. Compiled Statutes.

³ *Pierce v. U. S. (The Floyd Acceptances)*, 7 Wall. 666, 682, 19 L. Ed. 169, aff'g. 1 Ct. Cl. 270.

⁴ *McClure v. U. S.*, 19 Ct. Cl. 173.

⁵ *Roberts v. Fargo*, 10 N. D. 230, 86 N. W. 726.

⁶ *Creston Water Wks. v. Creston*, 101 Iowa, 687, 70 N. W. 739; *Kennedy v. New York*, 99 N. Y. App. Div. 588; *Schliess v. Grand Rapids*, 131 Mich. 52, 90 N. W. 700; *Norton v. Roslyn*, 10 Wash. 44, 38 Pac. 878.

⁷ *Hendrickson v. New York*, 160 N. Y. 144, 54 N. E. 680; *McDonald v. Mayor*, 68 N. Y. 23, 23 Am. R. 144; *People, ex rel. O'Reilly v. Common Council*, 189 N. Y. 66, 81 N. E. 557; *Lancaster v. Miller*, 58 Ohio St. 558, 51 N. E. 52; *Noel v. San Antonio*, 11 Tex. C. A. 580, 33 S. W. 263; *Chippewa Bridge Co. v. Durand*, 122 Wis. 85, 99 N. W. 603.

public body is not exhausted by the first or a single attempt at its exercise.¹ If the legislature surrounds the power with no limits or bounds, the extent of the use of the power is left to the discretion of the public body, and is a legislative question, not a judicial one, upon which the court cannot substitute its judgment for that of the governing body and voters of the community.² Under such grants of power, new water, light or other public service plants or contracts for new or additional supplies of these commodities may be made in the discretion of the public body without interference.³ Where the grant authorizes a supply and two distinct methods by which the supply may be obtained, the making of the contract in the former case or the exercise of either method in the latter exhausts the power conferred by the grant and a further attempt to exercise the power will be enjoined.⁴ In these circumstances, the municipality may neither erect its own plant or create competition by making another contract for a supply, under that particular grant of power.⁵ On the other hand, general terms in a statute have been declared not to create an exclusive franchise to furnish a public utility, so as to preclude the public body from obtaining it from other sources.⁶ There is a distinction, however, between grants of power or contracts made which exclude all competition and those which merely exclude competition by the public body until it shall pur-

¹ *Lucia v. Montpelier*, 60 Vt. 537, 15 Atl. 321, 1 L. R. A. 169; *Janeway v. Duluth*, 65 Minn. 292, 68 N. W. 24.

² *Idem.*

³ *Idem.*

⁴ *White v. Meadville*, 177 Pa. St. 643, 35 Atl. 695; *Wilson v. Rochester*, 180 Pa. St. 509, 38 Atl. 136; *Troy Water Co. v. Troy*, 200 Pa. St. 453, 50 Atl. 259.

⁵ *Atlantic City Water Works v. Atlantic City*, 39 N. J. Eq. 367. Cases, note 4.

⁶ *Re Brooklyn*, 143 N. Y. 596, 38 N. E. 983, 26 L. R. A. 270.

chase the plant of the existing company or make compensation to it.¹ And when there is no agreement that the public body will not compete, or purchase the plant, should it decide to compete, there is no barrier to such action,² and it may after granting a franchise which is not exclusive contract to erect its own plant,³ where it has not expressly or by necessary implication agreed otherwise. Such outstanding contract with a company still willing to carry out its contract does not operate to exhaust the power to procure water and light or other public service from another source.⁴ Even the exclusive right to light the streets of a municipality with gas for a definite period will not prevent it from contracting to light the streets by electricity.⁵ In like manner, where a public body has charter power to abate nuisances injurious to the public health and safety and to make regulations necessary to the preservation of health and the suppression of disease, it does not exhaust its power with respect to dust raised by the operation of a street railway where it requires by the franchise contract that such railway shall clean and repair so much of the street as is between the rails, but it may also require the sprinkling of the tracks to lay the dust.⁶ Where a clerk in publishing a required notice under a public improvement contract fails in his first effort to properly publish it, this will not deprive him or the

¹ *Walla Walla W. Co. v. Walla Walla City*, 60 Fed. 957, aff'd 172 U. S. 1, 43 L. Ed. 341.

² *Knoxville W. Co. v. Knoxville*, 200 U. S. 22, 50 L. Ed. 353; *Westerly Waterworks Co. v. Westerly*, 80 Fed. 611; *United R. R. v. San Francisco*, 249 U. S. 517, 63 L. Ed. 739.

³ *North Springs Water Co. v. Tacoma*, 21 Wash. 517, 58 Pac. 773, 47 L. R. A. 214.

⁴ *Nalle v. Austin*, 85 Tex. 520, 22 S. W. 668, 960.

⁵ *Saginaw G. L. Co. v. Saginaw*, 28 Fed. 529.

⁶ *St. Paul v. St. Paul City Ry. Co.*, 114 Minn. 250, 130 N. W. 1108, 36 L. R. A. n. s. 235.

public body of further power but they may treat the first publication as of no validity and proceed with the second publication.¹ Where a committee has been authorized by the general governing body to make a contract and made it, it exhausted its power and had no authority to enter into a second contract.²

¹ *Gilmore v. Utica*, 131 N. Y. 26, 29 N. E. 841.

² *Boston Elec. L. Co. v. Cambridge*, 163 Mass. 64, 39 N. E. 787.

CHAPTER III

CONTROL OF EXERCISE OF POWERS BY JUDICIAL AND LEGISLATIVE BRANCHES OF GOVERNMENT

§ 7. Judicial Control.

The State has the right to make contracts, incur obligations or expend money even though the work or purpose may be improvident and prove to be useless to the public. The legislature as the depositary of the sovereign powers of the people is the judge of the propriety and utility of making the contracts, incurring the obligations or expending the money, and the courts cannot institute an inquiry concerning the motives and purposes of the legislature in order to attribute to it a design contrary to that clearly expressed or fairly implied in the bill, without disturbing and impairing the functions assigned by the constitution to each department of government. The courts may not by independent inquiry, upon the testimony of witnesses, determine that the purpose of the legislature was to appropriate public money and make a contract expending it in improvements for the benefit of an individual and in this manner overthrow the legislative act and deny validity to such a contract.¹

Accordingly legislation under which public contracts may be made cannot be impeached or attacked or investigated when before the court, because the motives of the legislators were improper or against the general policy of the

¹ *Waterloo W. Mfg. Co. v. Shanahan*, 128 N. Y. 345, 28 N. E. 358; *Devoy v. Craig*, 231 N. Y. 186, 131 N. E. 884; *Daggett v. Colgan*, 92 Cal. 53, 28 Pac. 51; *McCulloch v. State*, 11 Ind. 424; *State v. Hays*, 49 Mo. 604.

State.¹ Nor may they be attacked even when fraud or corruption procured the legislation.²

In the case of political subdivisions of the State it is settled by an overwhelming weight of authority that within the sphere of their powers they are not subject to judicial control and supervision except in cases of fraud,³ or gross abuse of power or discretion.⁴ The courts may construe their powers, but the public bodies themselves are vested with the sole power of determining when they shall be exercised.⁵ This exercise being a matter of discretion is not subject to judicial control which would simply result in the substitution of the court's judgment for that of the officers to whom it was specifically intrusted by law.⁶

The motives which induce the legislative action of a governing body of a municipality or the influences which controlled it in enacting ordinances may not be inquired into by the judicial branch of government.⁷ Whether the act is within powers granted is for the courts to decide; whether it is a wise exercise of power is for the public body to determine.⁸

¹ *People v. Shepard*, 36 N. Y. 285; *Chase Hibbard M. Co. v. Elmira*, 207 N. Y. 460, 467.

² *U. S. v. Old Settlers*, 148 U. S. 427, 37 L. Ed. 509; *New Orleans v. Warner*, 175 U. S. 120, 44 L. Ed. 96; *Fletcher v. Peck*, 6 Cranch (U. S.), 87, 3 L. Ed. 162.

³ *Fawcett v. Mt. Airy*, 134 N. C. 125, 45 S. E. 1029.

⁴ *Crawfordsville v. Braden*, 130 Ind. 149, 28 N. E. 849; *Valparaiso v. Gardner*, 97 Ind. 1, 49 Am. R. 416.

⁵ *Fawcett v. Mt. Airy*, *supra*.

⁶ *Gale v. Kalamazoo*, 23 Mich. 344, 9 Am. R. 80; *In re Borough of Millvale*, 162 Pa. St. 374, 29 Atl. 641; *Des Moines G. Co. v. Des Moines*, 44 Iowa, 505, 24 Am. R. 756.

⁷ *Soon Hing v. Crowley*, 113 U. S. 703, 710, 28 L. Ed. 1145; *Gardner v. Bluffton*, 173 Ind. 454, 89 N. E. 853; *People v. Gardner*, 143 Mich. 104, 106 N. W. 541; *Moore v. Haddonfield*, 62 N. J. L. 386, 41 Atl. 946; *Kittinger v. Buffalo T. Co.*, 160 N. Y. 377, 54 N. E. 1081; *Wood v. Seattle*, 23 Wash. 1, 62 Pac. 135; *New Orleans v. Warner*, 175 U. S. 120, 44 L. Ed. 96; *Lilly v. Indianapolis*, 149 Ind. 648, 49 N. E. 887; *Paine v. Boston*, 124 Mass. 486.

⁸ *Douglas v. City Council of Greenville*, 92 S. C. 374, 75 S. E. 687; *Devoy v. Craig*, 231 N. Y. 186, 131 N. E. 884.

But while these governing bodies of municipalities are clothed with the sovereignty of the State to legislate precisely the same as the legislature might do, there are many duties devolved upon them which are not legislative in character, but are administrative, and in some instances quasi-judicial in nature and not at all impressed with the character of sovereignty. When they are acting in an administrative capacity, the courts may supervise their conduct and inquire into the motives which induced the members to vote and if their action was the result of corruption, fraud or bad faith amounting to fraud, it may be set aside.¹ Such action and a contract entered into thereby will in any event be determined void and against public policy,² or illegal and void.³

If an act of Congress is in question, its acts or the conduct or motives of its members cannot be made the subject of judicial investigation. Under no circumstances, may the judicial invade the legislative department for the correction of discretionary acts.⁴ The same rule applies to the executive department. The courts may not invade it to correct alleged mistakes or wrongs arising from asserted abuse of discretion.⁵

A determination of municipal authorities that a new street should be laid out across a steam surface railroad is not an act of political sovereignty merely but an exercise of a judicial function which may be reviewed in the courts, where the authority to determine as to the necessity of the crossing is qualified.⁶

¹ *Weston v. Syracuse*, 158 N. Y. 274, 53 N. E. 12; *State v. Gates*, 190 Mo. 540, 89 S. W. 881.

² *Weston v. Syracuse*, *supra*; *Honaker v. Bd. of Educ.*, 42 W. Va. 170, 24 S. E. 544.

³ *McMillan v. Barber Asph. P. Co.*, 151 Wis. 48, 138 N. W. 94.

⁴ *U. S. v. Old Settlers*, 148 U. S. 427, 466, 37 L. Ed. 509.

⁵ *Dakota Cent. Tel. Co. v. South Dakota*, 250 U. S. 163, 184.

⁶ *Matter of Delavan Ave.*, 167 N. Y. 256, 60 N. E. 589.

Thus the determination by a mayor or engineer under whose direction a contract is being carried out that it is not proceeding properly may be reviewed by the courts since it is the exercise of a judicial function, and, therefore, must be based upon facts to justify it. When it is exercised capriciously or arbitrarily the courts will afford a contractor relief against it.¹ In like manner the determination as to who is lowest bidder is judicial and may not be capriciously or arbitrarily determined.² The question whether a reserved power to suspend the work is properly exercised under the terms of the contract may be judicially reviewed.³

§ 8. Legislative Control.

The powers which have been delegated to municipalities by charter or statute are always subject to amendment or alteration by the legislature, unless restrained by constitutional provision.⁴

The political or governmental powers of municipalities are not vested rights and the legislature may alter, amend, change or revoke them at pleasure. They are mere agents of the State who stand in no contract relation to their sovereign. Even charters granted under the sovereignty of England are subject in the same manner to amendment, change or revocation. It is only with respect to their private or proprietary rights and interests that they may be entitled to protection under the contract clause

¹ *Chicago v. Sexton*, 115 Ill. 230, 2 N. E. 263; *Wakefield Cons. Co. v. New York*, 157 N. Y. App. Div. 535, 213 N. Y. 633.

² *Erving v. Mayor*, 131 N. Y. 133; *People ex rel. Coughlin v. Gleason*, 121 N. Y. 631, 25 N. E. 4; *Molloy v. New Rochelle*, 198 N. Y. 402, 92 N. E. 94.

³ *Johnston v. New York*, 191 N. Y. App. Div. 205.

⁴ *Demarest v. Mayor*, 74 N. Y. 161; *New Orleans v. New Orleans W. Co.*, 142 U. S. 79, 35 L. Ed. 943; *Hunter v. Pittsburgh*, 207 U. S. 161, 52 L. Ed. 151, aff'g 217 Pa. St. 227, 66 Atl. 348.

of the Federal Constitution.¹ While municipalities are created by the legislature as instrumentalities of government, and so far as legislation for governmental purposes is concerned are thus subject to control, yet where the purpose is a private one, they cannot be compelled to enter into contracts,² and this obtains although the contract is public in some respects. They cannot, therefore, be compelled to take stock in a private corporation against their will and without their consent.³ Property of which a public body has acquired absolute ownership as an agency of the State is subject to legislative control, but not the property which it holds as proprietor in its private capacity.⁴

Municipalities possess all the powers of corporations generally and, therefore, may not be deprived of their property by legislative action without their consent or due process of law any more than a private corporation can, and since their revenues must be used for municipal purposes, the legislature cannot make contracts for them which involve the expenditure of these revenues without their consent.⁵

¹ *New Orleans v. New Orleans W. Co.*, *supra*; *Demarest v. Mayor*, *supra*.

² *People ex rel. Dunkirk W. & P. R. Co. v. Batchellor*, 53 N. Y. 128, 13 Am. R. 480.

³ *People ex rel. Dunkirk W. & P. R. Co. v. Batchellor*, *supra*.

⁴ *Higginson v. Boston*, 212 Mass. 583, 99 N. E. 523.

⁵ *People ex rel. Rodgers v. Coler*, 166 N. Y. 1, 59 N. E. 716.

CHAPTER IV

SURRENDER OR BARTER OF DISCRETIONARY POWERS— BINDING SUCCESSORS

§ 9. Surrender and Barter of Legislative and Governmental Power.

The States and their agents, the municipalities acting through their legislative or general governing bodies, may not agree that they will refrain from the exercise of their governmental powers. They have no power to enter into contracts which diminish or prohibit the exercise of legislative authority, whenever the public interests demand that they should act. They may not bind themselves to subserve private interests. The functions of legislative and governmental power must be preserved for the public good and not curtailed or embarrassed.¹ The judgment of public officials in these matters must be without restraint or control so that it may be exercised impartially and at all times.² They may not render themselves, as occasion for its exercise shall occur from time to time, unable to control any matter which may arise in the future concerning which they shall have a legislative duty.³

Municipalities, therefore, cannot divest themselves of

¹ *Darling v. Newport News*, 249 U. S. 540, 63 L. Ed. 759; *Martin v. Brooklyn*, 1 Hill, 546; *People ex rel. Healy v. Clean Street Co.*, 225 Ill. 470, 80 N. E. 298.

² *Edwards v. Goldsboro*, 141 N. C. 60, 53 S. E. 652.

³ *Davis v. N. Y.*, 14 N. Y. 506; *Snyder v. Mt. Pulaski*, 176 Ill. 397, 52 N. E. 62; *Gale v. Kalamazoo*, 23 Mich. 344; *Wash. R. Co. v. Defiance*, 167 U. S. 88, 42 L. Ed. 87, aff'g 52 Ohio St. 262, 40 N. E. 89; *State ex rel. Townsend v. Bd. of Park Commrs.*, 100 Minn. 150, 110 N. W. 1121.

the legislative discretion conferred upon them by law. They can neither surrender it by contract, nor bind themselves not to exercise it whenever it may become necessary.¹ They may not delegate its exercise to private individuals or even to administrative officials.² They cannot surrender or contract away any of the great governmental powers such as the police power, the power of taxation or the power of eminent domain. These powers cannot be bartered away.³ They are inalienable even by express grant.⁴ But a State or its local government when so empowered may make a binding contract divesting itself for a substantial period of time of the power to regulate rates.⁵ The time must be only for a reasonable time.⁶ It cannot divest itself by a perpetual contract.⁷

Merely because a statute requires the consent of a city before tracks can be laid will not authorize a city to contract away the police power or power of taxation of the State on consenting to the construction of tracks in the public street.⁸ Not even the State itself could do this, for these great powers of government must be re-

¹ *Brick Pres. Church v. New York*, 5 Cowen, 540; *Johnson v. Phila.*, 60 Pa. St. 445.

² *New Orleans v. Sanford*, 137 La. 628, 69 So. 35; *Thompson v. Schermerhorn*, 6 N. Y. 92; *Zable v. Louisville Bapt. Orphan Home*, 92 Ky. 89, 17 S. W. 212.

³ *Northern Pac. Ry. Co. v. Duluth*, 208 U. S. 583, 52 L. Ed. 630, aff'g 98 Minn. 429, 108 N. W. 269; *Stone v. Mississippi*, 101 U. S. 814, 25 L. Ed. 1079.

⁴ *Denver & R. G. R. R. Co. v. Denver*, 250 U. S. 241, 63 L. Ed. 958.

⁵ *Home Tel. Co. v. Los Angeles*, 211 U. S. 273, 53 L. Ed. 176, aff'g 155 Fed. 554; *Minneapolis v. St. Ry. Co.*, 215 U. S. 417, 54 L. Ed. 259.

⁶ *Home Tel. Co. v. Los Angeles*, *supra*; *Danville v. Danville W. Co.*, 178 Ill. 299, 53 N. E. 118; *Columbus G. L., etc., Co. v. Columbus*, 50 Ohio St. 65, 33 N. E. 292; *McBean v. Fresno*, 112 Cal. 159, 44 Pac. 358, 31 L. R. A. 794.

⁷ *Westminster W. Co. v. Westminster*, 98 Md. 551, 56 Atl. 990; *Mobile Elec. Co. v. Mobile*, 201 Ala. 607, 79 So. 39, L. R. A. 1913 F. 667.

⁸ *Rochester Ry. Co. v. Rochester*, 205 U. S. 236, 51 L. Ed. 784, aff'g 182 N. Y. 99, 74 N. E. 953, 70 L. R. A. 773.

tained undiminished to be exercised whenever the welfare of the State requires.¹

In like manner, a provision in a charter by which the State barter away any of the powers of sovereignty, as, for instance, the power of eminent domain, is void and when the bargain is attacked, the constitutional protection of the obligations of contract will not apply.² Under these principles municipalities may through legislative act when properly and clearly thereunto authorized make inviolable contracts fixing the rates which those exercising public service functions or franchises shall charge during a definite term provided it be not unreasonable in duration, and it does not matter that the effect of such a contract is to suspend, during the life of such contract, the governmental power to regulate rates.³ But where, on the other hand, an ordinance is passed by a city council and accepted by a public service company as part of its franchise by which it is required to sell half fare tickets to certain classes of passengers, this does not constitute an inviolable contract protected from change or annulment by the legislature under the contract clause of the Federal Constitution, but is a mere governmental rule or regulation which is subject to revocation by the legislature of the State.⁴

Since the provisions of municipal charters are subject to the legislative authority of the State, contractual pro-

¹ State *ex rel.* Townsend *v.* Bd. of Pk. Commrs., 100 Minn. 150, 110 N. W. 1121.

² Hyde Park *v.* Oakwoods Cemetery Assn., 119 Ill. 141, 7 N. E. 627.

³ Home Tel. Co. *v.* Los Angeles, 211 U. S. 265, 53 L. Ed. 176, aff'g 155 Fed. 554; Englewood *v.* Denver & S. R. Co., 248 U. S. 294, 63 L. Ed. 253; Worcester *v.* Worcester St. Ry. Co., 196 U. S. 539, 49 L. Ed. 591, aff'g 182 Mass. 49, 64 N. E. 581; New Orleans *v.* New Orleans W. Co., 142 U. S. 79, 35 L. Ed. 943; Minneapolis R. Co. *v.* Street Ry. Co., 215 U. S. 417, 54 L. Ed. 259.

⁴ Pawhuska *v.* Pawhuska O. & G. Co., 250 U. S. 394, 63 L. Ed. 1054; Dubuque Elec. Co. *v.* Dubuque, 260 Fed. 353.

visions in franchises conferred by municipal corporations upon public service companies are subject to be set aside by the exercise of the sovereign power of the State,¹ unless the legislature has expressly provided that municipal corporations may make a binding agreement with such companies respecting the rates or fares.² The provisions of the State constitution that consent to construct street railroads must be obtained from the local authorities is not a surrender by the State of the right to govern or regulate fares under its police power. These provisions do not affect the inherent power of the State to regulate the fares to be charged by a public service corporation.³ In the acquiring of land to be used in widening or opening a street it may not agree, in consideration of a conveyance of such land, to maintain the street as widened,⁴ or perpetually as a particular class of highway,⁵ as such action divests it of legislative powers. Nor may it contract away its continuing duty to keep highways safe and under its control.⁶ Under such attempted exercise of power, no enforceable right can arise to maintain a private drain in a highway,⁷ nor a private railroad spur,⁸ nor for the

¹ *Ewing v. Seattle*, 55 Wash. 229; *Puget Sound Traction Co. v. Reynolds*, 244 U. S. 574, 61 L. Ed. 1325, aff'g 223 Fed. 371.

² *Detroit United Railway v. Michigan*, 242 U. S. 238, 248, 61 L. Ed. 268; *Matter of Quimby v. Public Service Comm.*, 223 N. Y. 244, 119 N. E. 433; *People ex rel. Village of So. Glens Falls v. Public Service Comm.*, 225 N. Y. 216, 121 N. E. 777; *Matter of Inter. Ry. v. Pub. Serv. Comm.*, 226 N. Y. 474, 124 N. E. 123; *Matter of Niagara Falls v. Pub. Serv. Comm.*, 229 N. Y. 333, 128 N. E. 247; *Matter of McAneny*, 198 N. Y. App. Div. 205; aff'd 232 N. Y. 377; *People ex rel. New York v. Nixon*, 229 N. Y. 356, 128 N. E. 245.

³ *Matter of McAneny*, *supra*.

⁴ *Penley v. Auburn*, 85 Me. 278, 27 Atl. 158.

⁵ *State ex rel. Townsend v. Bd. of Pk. Commrs.*, 100 Minn. 150, 110 N. W. 1121.

⁶ *Ft. Smith v. Hunt*, 72 Ark. 556, 82 S. W. 163; *Chicago, B. & R. Co. v. Quincy*, 136 Ill. 563, 27 N. E. 192; *Vandalia R. Co. v. State*, 166 Ind. 219, 76 N. E. 980.

⁷ *Eddy v. Granger*, 19 R. I. 105, 31 Atl. 831.

⁸ *Hatfield v. Straus*, 189 N. Y. 208, 82 N. E. 172.

continuance of any private purpose or enterprise.¹ And it may not deprive itself of the right to compel the owners of a street railway to keep that part of the streets occupied by it clean.² It may not agree to maintain a bridge or other structure perpetually.³

§ 10. Surrender of Legislative Power—Binding Successors.

A municipality has two classes of powers—the one legislative, public, governmental, in the exercise of which it is a sovereign and governs its people;—the other proprietary, or business powers, quasi-private in their nature, conferred upon it not for the purpose of governing its people, but for the private advantage of such public body itself as a legal personality. In the exercise of the former class of powers officers of the municipality can make no grant and conclude no contract which will bind it beyond the terms of their offices. They cannot circumscribe the legislative powers of their successors and deprive them of the right to their unrestricted exercise, as the exigencies of the times may demand. They are bound to transmit their powers of government to each successive set of officers unimpaired.⁴

But in the exercise of their proprietary powers, they are controlled by no such rule, because they are acting and contracting for the private benefit of the municipality and its inhabitants, and they may exercise the business powers conferred upon it in the same way and subject to the same rules as govern a natural person.⁵ They may, therefore, just as natural persons, unless they have been limited by

¹ *People ex rel. Healy v. Clean Street Co.*, 225 Ill. 470, 80 N. E. 298; *State ex rel. Belt v. St. Louis*, 161 Mo. 371, 61 S. W. 658.

² *Chicago v. Chicago U. T. Co.*, 199 Ill. 259, 65 N. E. 243.

³ *State ex rel. St. Paul v. Minnesota Transfer Co.*, 80 Minn. 108, 83 N. W. 32.

⁴ *Ill. Trust & Sav. Bk. v. Arkansas City*, 76 Fed. 271; *Omaha Water Co. v. Omaha*, 147 Fed. 1; *Gale v. Kalamazoo*, 23 Mich. 344; *Tempe v. Corbell*, 17 Ariz. 1, 147 Pac. 745.

⁵ *Idem.*

statute, make contracts of long duration relating to the proprietary or business side of their existence, and these contracts when executed will bind their successors.¹ The only limitation which the law imposes, however, in the case of these public bodies is that the term or duration of the contract shall not be unreasonable. These powers of a business nature include the power to contract for goods and supplies, for public printing, for buildings, for water, gas, electricity, subways and similar needs of the community.² Contracts whose duration has extended variously up to thirty years affecting the supply of water and light, have been sustained as reasonable,³ although in some few jurisdictions when the duration reaches or approaches a term of thirty years, it has been held unreasonable.⁴ Public officials may not bind their successors in office to a surrender of legislative discretion,⁵ as by a perpetual,⁶ or unreasonable contract.⁷ An exception has also been made in the case of personal or professional service contracts to the effect that such do not bind succeeding officials into whose term of office they extend.⁸

¹ *Idem.*

² *Idem.*; Matter of Board of Rapid Transit Commrs., 197 N. Y. 81, 90 N. E. 456, 91 N. E. 1110, 36 L. R. A. n. s. 647; Valparaiso v. Gardner, 97 Ind. 1, 49 Am. R. 416; Pickett Pub. Co. v. Carbon County, 36 Mont. 188, 92 Pac. 524.

³ Hartford v. Hartford L. Co., 65 Conn. 324, 32 Atl. 925; Vincennes v. Cits. G. L. Co., 132 Ind. 114, 31 N. E. 573, 16 L. R. A. 485; Monroe W. Co. v. Heath, 115 Mich. 277, 73 N. W. 234; Walla Walla v. Walla Walla W. Co., 172 U. S. 1, 43 L. Ed. 341, aff'g 60 Fed. 957.

⁴ Long v. Duluth, 49 Minn. 280, 51 N. W. 915; Brenham v. Brenham W. Co., 67 Tex. 542, 4 S. W. 143.

⁵ Waterbury v. Laredo, 68 Tex. 565, 5 S. W. 81; Westminster W. Co. v. Westminster, 98 Md. 551, 56 Atl. 990.

⁶ Westminster W. Co. v. Westminster, 98 Md. 551, 56 Atl. 990; State ex rel. St. Paul v. Minnesota Trans. Co., 80 Minn. 180, 83 N. W. 32; Danville W. Co. v. Danville, 178 Ill. 299, 53 N. E. 118.

⁷ Columbus W. Co. v. Columbus, 48 Kan. 99, 28 Pac. 1097.

⁸ Emmett v. DeLong, 12 Kan. 67; Wilmington v. Bryan, 141 N. C. 66, 54 S. E. 543; Mack v. New York, 37 Misc. 371, 82 N. Y. App. Div. 637; Jacobs v. Elmira, 147 N. Y. App. Div. 433.

When one municipality is about to be merged into a larger city, it is deprived of power to bind itself beyond the term of its own existence and so cannot bind its successors. Accordingly, a contract for a term of ten years entered into by a town fourteen days before the town was merged into the greater city by virtue of the Greater New York Charter was declared to be a scheme to incumber and burden the new city and would not be permitted to have effect.¹ A public body has power, even though the terms of office of its members is about to expire, and their successors have been elected, to contract for county printing for a term which will extend almost throughout the entire time the succeeding board will be in office.² The erection of a bridge and agreement to maintain it perpetually will not bind.³

In some States, the legislature has provided a limit of duration during which public contracts may continue in force and effect. Contracts made for a term longer than permitted by statute are wholly void,⁴ but such contracts have been declared bad only for the excess period,⁵ which is a more reasonable and logical result. A lease of property by the national government through its officials is only binding for the fiscal year.⁶ In like manner, where a public body was limited in its power to contract for water supply to one year and it entered into a contract for twenty years the contract was held good so

¹ *Hendrickson v. New York*, 160 N. Y. 144, 54 N. E. 680.

² *Picket Pub. Co. v. Carbon County*, 36 Mont. 188, 92 Pac. 524.

³ *State ex rel. v. Minn. Trans. Co.*, 80 Minn. 108, 83 N. W. 32.

⁴ *Gas L. Coke Co. v. New Albany*, 156 Ind. 406, 59 N. E. 176; *Somerset v. Smith*, 105 Ky. 678, 49 S. W. 456.

⁵ *State v. Ironton G. Co.*, 37 Ohio St. 45; *Neosho &c. W. Co. v. Neosho*, 136 Mo. 498, 38 S. W. 89; *Defiance W. Co. v. Defiance*, 90 Fed. 753; *Mobile Elec. Co. v. Mobile*, 201 Ala. 607, 79 So. 39, L. R. A. 1918 F. 667.

⁶ *Hooe v. U. S.*, 218 U. S. 322, 54 L. Ed. 1055, aff'g 43 Ct. Cl. 245; *Chase v. U. S.*, 155 U. S. 489, 39 L. Ed. 234, aff'g 44 Fed. 732.

far as executed, in other words, that the public body should pay for the benefits it received under the contract, and that an action would lie for water used in any one year.¹

¹ *Montgomery v. Montgomery Works Co.*, 79 Ala. 233.

CHAPTER V

POWERS OF OFFICERS

§ 11. Powers of Public Officers to make Contracts.

All persons who deal with municipalities and subordinate boards and agencies of the State and national governments, must at their peril inquire into the power of the officers or agents of such municipalities, boards or agencies to make the contract contemplated, for acts of such officers can only bind in the manner and to the extent authorized.¹ Those dealing with these officials are chargeable with knowledge of the limitations upon their power to contract, and where they transgress the powers, their acts are void and will bind no one.² In like manner, even though a contract is not *ultra vires* but is entirely within the scope of its corporate powers, public bodies are not bound by such a contract executed in its name, if the officer who executes it had no power or authority to enter into the contract.³

In this latter class of cases, of course, the public body may ratify the contract,⁴ but where the public body had no power to enter into the contract, such a contract

¹ *Baltimore v. Musgrave*, 48 Md. 272, 30 Am. R. 458; *May v. Chicago*, 124 Ill. App. 527, 222 Ill. 595, 78 N. E. 912; *Smith & Co. v. Denver*, 20 Colo. 84, 36 Pac. 844; *Nesbit v. Riverside &c. Dist.*, 144 U. S. 610, 36 L. Ed. 562, aff'g 25 Fed. 635; *Moore v. Detroit*, 164 Mich. 543, 129 N. W. 715.

² *Peters v. St. Louis*, 226 Mo. 62, 125 S. W. 1134; *Cits Bk. v. Spencer*, 126 Iowa 101, 101 N. W. 643.

³ *Floyd County v. Allen*, 137 Ky. 575, 126 S. W. 124; *Baltimore v. Reynolds*, 20 Md. 1, 83 Am. Dec. 535.

⁴ *Marsh v. Fulton County*, 77 U. S. 676, 19 L. Ed. 1040.

cannot be ratified except by the legislature.¹ It is no defense for a contractor to say that he presumed that the agents of the public body transacted their business properly and under sufficient authority, as that principle of the law of agency has no application to officers and agents of a public body where powers are defined by statute.² Nor may a contractor rely upon a claim by him that the public officials have frequently before made similar transactions for, however common such occasions they cannot establish a usage in cases not authorized. Custom cannot be made the substitute for undelegated authority.³ And the receipt of the benefits will not imply a promise.⁴ So, a material man who sells gravel to a city officer is chargeable with knowledge of his power to contract,⁵ and where he had no power, and the gravel has been used in mending the streets and cannot be returned specifically, there arises no liability of any kind, not even for reasonable value.⁶ Though if the material as such was in the city's possession when the action was begun it would have had to return it or pay for it.⁷ Public authorities who have charge of the sale of a building cannot bind the public body by a guaranty which differs from the conditions

¹ *Re Niland*, 193 N. Y. 180, 85 N. E. 1012; *Peterson v. New York*, 17 N. Y. 449; *Lyddy v. Long Island City*, 104 N. Y. 218, 10 N. E. 155.

² *McDonald v. Mayor*, 68 N. Y. 23; *Smith v. Newburgh*, 77 N. Y. 137.

³ *Delafield v. State of Illinois*, 26 Wend. 192; *The Floyd Acceptances*, 74 U. S. (7 Wall.) 666, 677, 19 L. Ed. 169; *Wormstead v. Lynn*, 184 Mass. 425, 68 N. E. 841.

⁴ *McDonald v. Mayor*, 68 N. Y. 23; *Dickinson v. Poughkeepsie*, 75 N. Y. 65; *Appleton W. Wks. Co. v. Appleton*, 132 Wis. 563, 113 N. W. 44; *O'Rourke v. Phila.*, 211 Pa. 79, 60 Atl. 499.

⁵ *Bartlett v. Lowell*, 201 Mass. 151, 87 N. E. 195; see *Osgood v. Boston*, 165 Mass. 281, 43 N. E. 108; *Roberts v. Fargo*, 10 N. D. 230, 86 N. W. 726; *Ecroyd v. Coggeshall*, 21 R. I. 1, 41 Atl. 260.

⁶ *Bartlett v. Lowell*, *supra*; See *Des Moines v. Spencer*, 126 Iowa, 101, 101 N. W. 643; *Keating v. Kansas City*, 84 Mo. 415; *Turney v. Bridgeport*, 52 Conn. 412, 12 Atl. 520.

⁷ *Bartlett v. Lowell*, 201 Mass. 151, 87 N. E. 195.

set out in the ordinance authorizing such officials to act.¹ Nor may selectmen bind a city to pay for meals procured from the keeper of a restaurant while in session under a statute which provided compensation per hour and their necessary expenses.² The agent of a public body who undertakes to bind it by contract must show authority for his action therefor and a contract made beyond his powers is void.³ The authority which he relies upon may come either from the legislature or from the general governing body of the municipality. The latter may authorize appropriate agencies to make contracts when not limited or restricted and the acts of such agents will bind.⁴

But while it is true that if a public officer acts outside of the scope of his official authority given him by law, the public body which he represents will not be bound by his acts,⁵ yet where a specific law is not the source of his authority, but rather he receives it from the contract, which is authorized by law, necessarily entered into and conducted by the officers of the public body, they must necessarily have such powers as will make the contract effective in its beginning and progress, and the public body will accordingly be bound by its exercise.⁶ Again

¹ *Osgood v. Boston*, 165 Mass. 281, 43 N. E. 108.

² *Heublein Bros. v. New Haven*, 75 Conn. 545, 54 Atl. 298.

³ *Burchfield v. New Orleans*, 42 La. Ann. 235, 7 So. 448; *Black v. Detroit*, 119 Mich. 571, 78 N. W. 660; *Cheeny v. Brookfield*, 60 Mo. 53; *Farrell v. Coatesville*, 214 Pa. St. 296, 63 Atl. 742; *Wahl v. Milwaukee*, 23 Wis. 272; *Ross v. Long Branch*, 73 N. J. L. 292, 63 Atl. 609; *Friedenstein v. U. S.*, 35 Ct. Cl. 1.

⁴ *Donovan v. N. Y.*, 33 N. Y. 291; *Walsh v. Columbus*, 36 Ohio St. 169.

⁵ *State Trust Co. v. Duluth*, 104 Fed. 632; *Wisconsin Cent. R. Co. v. U. S.*, 164 U. S. 190, 212, 41 L. Ed. 399, aff'g 27 Ct. Cl. 440; *Ft. Edward v. Fish*, 156 N. Y. 363, 50 N. E. 973; *Logan County v. U. S.*, 169 U. S. 255, 42 L. Ed. 737, aff'g 31 Ct. Cl. 23; *Maryland Steel Co. v. U. S.*, 235 U. S. 451, 59 L. Ed. 312.

⁶ *Maryland Steel Co. v. U. S.*, 235 U. S. 451, 59 L. Ed. 312; *Brady v. Mayor*, 132 N. Y. 415, 30 N. E. 757; *Messenger v. Buffalo*, 21 N. Y. 196.

the public body may so deal with third persons as to justify them in assuming the existence of an authority in another, which in fact has never been given.¹ Where the circumstances of the contract require the affirmative duty of the public body to act and it fails to act with reference to the subject-matter, it will be assumed that the continued receipt of the fruits and benefits of the contract was by its authority and acquiescence.²

§ 12. When Public Body is Bound by Acts of Public Officers.

Public bodies are not bound by the acts of their officers in making unauthorized changes in public contracts. Individuals as well as courts must take notice of the extent of the authority conferred by law upon a person acting in an official capacity. Ignorance of the law furnishes no excuse for any mistake or wrongful act.³ Different rules prevail in respect to the acts and declarations of public agents from those governing in the case of private agents. Principals of the latter are often bound by the acts and declarations of their agents even where the act or declaration was done or made without any authority, if it appear that the act was done, or the declaration made, in the regular course of employment. But public bodies or the public authority are not bound in such a case unless it manifestly appears that the agent was acting within the

¹ *Davies v. N. Y.*, 93 N. Y. 250; see *Van Dolsen v. Bd. of Educ.*, 162 N. Y. 446, 56 N. E. 990.

² *Davies v. N. Y.*, 93 N. Y. 250.

³ *Hawkins v. U. S.*, 96 U. S. 689, 24 L. Ed. 607, aff'g 12 Ct. Cl. 181; *Whiteside v. U. S.*, 93 U. S. 247, 23 L. Ed. 882, aff'g 8 Ct. Cl. 532; *Logan County v. U. S.*, 169 U. S. 255, 42 L. Ed. 737, aff'g 31 Ct. Cl. 23; *Maryland Steel Co. v. U. S.*, 235 U. S. 451, 59 L. Ed. 312; *State ex rel. v. Hays*, 52 Mo. 578; *Delafield v. Illinois*, 26 Wend. 192; *Baltimore v. Reynolds*, 20 Md. 1, 83 Am. Dec. 535.

scope of his authority, or that he had been held out as having authority to do the act, or make the declaration, for or on behalf of the public authorities.¹

Public officials cannot bind public bodies either by making or ratifying a fraudulent contract² or an illegal contract.³ Boards of audit even in allowing accounts are limited to the powers conferred and when they transgress their limitations, their acts are void.⁴ An illegal audit can be attacked either directly or collaterally because it is void. But an audit based upon a legal power to act, but erroneous as to some matter of fact or law is a judicial determination under competent jurisdiction and cannot be reaudited by some other officer or collaterally attacked.⁵ However, public officials may bind the public body of which they are officers by acts done or words uttered when done or spoken or uttered by an authorized officer or agent who had charge of the matter or in the line or scope of his duty.⁶ In the case of contracts, authorized by law, and not merely special law which may limit and control, and which are necessarily entered into and conducted by officers of a public body, they must of necessity possess the powers to make such contracts effective not merely in their beginning but in their progress as well. They therefore have authority to waive and modify conditions of such a contract and their acts are binding.⁷

¹ *Hawkins v. U. S.*, 96 U. S. 689, 24 L. Ed. 607, aff'g 12 Ct. Cl. 181.

² *Nelson v. Mayor*, 131 N. Y. 4, 29 N. E. 814.

³ *Ft. Edward v. Fish*, 156 N. Y. 363, 50 N. E. 973.

⁴ *Nelson v. Mayor*, *supra*; *People ex rel. Smith v. Clarke*, 174 N. Y. 259, 262, 263, 66 N. E. 819.

⁵ *People ex rel. Smith v. Clarke*, *supra*.

⁶ *Halbut v. Forrest City*, 34 Ark. 246; *Nelson v. New York*, 5 N. Y. Supp. 688, 131 N. Y. 4, 29 N. E. 814; *Town Dist. of Hardwick v. Wolcott*, 78 Vt. 23, 61 Atl. 471; *Maher v. Chicago*, 38 Ill. 266.

⁷ *Maryland Steel Co. v. U. S.*, 235 U. S. 451, 59 L. Ed. 312.

§ 13. Public Officer Signing Individually.

Where a contract is signed by the officers of a public body with their individual seals attached but it is intended to be effectual as a contract with the public body and its contractor, it will be sustained as such.¹

§ 14. Liability of Public Officers.

No right of action will lie against a public official for failure to award a contract to a bidder on public work even though he acts maliciously in so doing.² But where his refusal is not regarded in the light of a judicial act he must act in good faith in refusing the award.

§ 15. Agents—Omission to Perform Extrinsic Act which is Foundation of Authority to Act.

It is a settled doctrine of the law of agency that where the principal has clothed his agent with power to do an act upon the existence of some extrinsic fact necessarily and peculiarly within the knowledge of the agent, and of the existence of which the act of executing the power is itself a representation, a third person dealing with such agent in entire good faith, pursuant to the apparent power, may rely upon the representation, and the principal is estopped from denying its truth to his prejudice. This rule is of course not of universal application in the case of public corporations or boards and must of necessity have limited application to them because of their prescribed powers.³ It has, however, been applied against towns in favor of bona fide holders of its obligations.⁴

¹ *Parr v. Greenbush*, 72 N. Y. 463.

² *Talbot Pav. Co. v. Detroit*, 109 Mich. 657, 67 N. W. 979; *East River G. L. Co. v. Donnelly*, 93 N. Y. 557.

³ *Van Dolsen v. Bd. of Education*, 162 N. Y. 446, 56 N. E. 990.

⁴ *Solon v. Williamsburgh Sav. Bank*, 114 N. Y. 122, 21 N. E. 168; *Bank of Rome v. Rome*, 19 N. Y. 20.

It serves to protect the innocent against the active or constructive deceit of public officers, who, having the power in their discretion to do the act lying at the foundation of their authority, omit it, and fail to disclose the omission but contract as if there were none. Of course, where the act omitted or represented as performed is not within the power of the principal or agent to perform, the rule cannot apply.¹

Defenses by official boards resting upon their omission to do the acts they had the power to do in order to perfect the authority they assumed to exercise, are not favored when invoked against innocent parties dealing with them in good faith.² Where a contract was made but the board making it failed to make an appropriation the contract will not be invalidated where the contractor performed the work in good faith, without knowledge that the appropriation had not been made, and he had no means of protecting himself against the exhaustion of appropriations available and sufficient at the time his contract was made, but which were not specifically appropriated to his contract through carelessness until the exhaustion prevented it being made at all.³ The failure of a contractor to file plans or comply with other similar requirements will not deprive a contractor of his rights under a contract, where there is no duty to perform the act, or the duty rests on the owner.⁴

§ 16. Powers of Particular Officers.

The mayor of a city has no general power or any implied

¹ *Cogwin v. Hancock*, 84 N. Y. 532; *Van Dolsen v. Bd. of Education*, *supra*; *Wormstead v. Lynn*, 184 Mass. 425, 68 N. E. 841.

² *Moore v. Mayor*, 73 N. Y. 238; *Reilly v. Albany*, 112 N. Y. 30, 19 N. E. 508; *Van Dolsen v. Bd. of Education*, *supra*.

³ *Van Dolsen v. Bd. of Education*, *supra*; *Davidson v. White Plains*, 197 N. Y. 266, 90 N. E. 825; *McGovern v. New York*, 185 N. Y. App. Div. 609; see *O'Rourke Eng. & Cons. Co. v. New York*, 140 *id.* 498.

⁴ *Ordway v. Newburyport*, 230 Mass. 306, 119 N. E. 863.

power to bind the public body by contract, and where he has power conferred upon him, he acts simply as the instrument and agent of the council, which alone has power to obligate the city, and can only bind it to the extent of the power conferred.¹ He cannot impose obligations by new terms and conditions in the contract, nor has he power to change it in any degree. In like manner, the comptroller while he is the chief financial officer of the city and in some cities by charter is given very extraordinary and extensive powers, can only act within the authority expressly given to him.² The corporation counsel or chief law officer of the city possesses only the power of a lawyer retained and can obligate the public body he represents only in the same manner as a lawyer may bind an individual client.³ An armory board has no power to employ an architect.⁴

¹ State *ex rel.* Keith *v.* Comm. Council, 138 Ind. 455, 37 N. E. 1041; Wiloughby *v.* City Council, 51 S. C. 412, 29 S. E. 242.

² Paul *v.* Seattle, 40 Wash. 294, 82 Pac. 601.

³ Bank of Commerce *v.* Louisville, 174 U. S. 428, rev'g 88 Fed. 398; Bush *v.* O'Brien, 164 N. Y. 205, 58 N. E. 106.

⁴ Horgan & Slattery, Inc., *v.* New York, 114 N. Y. App. Div. 555.

CHAPTER VI

MANNER OF EXERCISING POWERS

§ 17. When Manner Is or Is Not Prescribed.

When the legislature grants to public bodies full power and unlimited authority to construct or erect public works or to do or perform some act in the carrying out of the purposes and objects for which they were created and prescribes no manner of making contracts necessary to the exercise of such powers, the contract may be made in the manner selected by the governing body by a vote upon a motion or by the passage of a resolution to that end, and it is not essential that the contract be made by ordinance to be valid.¹ The courts will not interfere with or undertake to control the manner of the exercise of these powers where the statute leaves the manner of exercising them to the governing body of the municipality.²

But where a public body is authorized to make a contract only in a certain prescribed manner and under certain conditions or circumstances and the making of the contract in any other manner is impliedly excluded, the contract which does not conform to the statute is void and no recovery will be permitted even upon an implied liability to pay for benefits received under the contract.³

A practice or custom of the officers of public bodies

¹ *San Francisco G. Co. v. San Francisco*, 9 Cal. 453.

² *Admiral Realty Co. v. New York*, 206 N. Y. 110, 99 N. E. 241; *Perry v. Town of Panama City*, 67 Fla. 285, 65 So. 6.

³ *McDonald v. New York*, 68 N. Y. 23; *New Jersey Car. Spr. &c. Co. v. Jersey City*, 64 N. J. L. 544, 46 Atl. 649; *Wellston v. Morgan*, 65 Ohio St. 219, 62 N. E. 127; *Bosworth-Chanute Co. v. Brighton*, 272 Fed. 964.

in transacting business, not in strict compliance with the requirements of its charter, cannot bind such public bodies on a contract not executed or authorized in the manner provided by such charter.¹

A seal is unnecessary to the valid exercise of the power to contract.² But if the statute provides for a vote of the taxpayers, or a prior appropriation or a certificate of the head of a department as a prerequisite to the making of the contract the failure to fulfill these conditions will avoid the contract.

§ 18. Defects in Preliminary Proceedings.

If the charter or statutes require certain acts to be performed before public contracts may lawfully be let, the omission to comply with these requirements will invalidate the contract.³ But where the defect is only technical, or a trivial defect in the notice, such a slight departure from the authority conferred will not be allowed to operate so as to destroy the whole proceeding.⁴ And where the public body has the power to contract for the subject-matter in hand and the express contract is invalid for some irregularity in its execution it will be liable on an implied contract for the benefits received.⁵ But where the statute provides that the work or improvement shall be let by separate contract for each particular work this is an essen-

¹ *Paul v. City of Seattle*, 40 Wash. 294, 82 Pac. 601; *Wormstead v. Lynn*, 184 Mass. 425, 68 N. E. 841.

² *Draper v. Springport*, 104 U. S. 501, 26 L. Ed. 812; *Rumford Dist. v. Wood*, 13 Mass. 193.

³ *People ex rel. J. B. Lyon Co. v. McDonough*, 173 N. Y. 181, 65 N. E. 963; *Cits. Bk. v. Spencer*, 126 Iowa, 101, 101 N. W. 643; *Hall v. Chippewa Falls*, 47 Wis. 267, 2 N. W. 279; *Rork v. Smith*, 55 Wis. 67, 12 N. W. 408.

⁴ *Portland Lumbering Co. v. East Portland*, 18 Oreg. 21, 22 Pac. 536.

⁵ *San Francisco G. L. Co. v. San Francisco*, 9 Cal. 453; *Boyd v. Black Sch. Tp.*, 123 Ind. 1, 23 N. E. 862; *Kramrath v. Albany*, 127 N. Y. 575, 28 N. E. 400; *Long v. Lemoyne*, 222 Pa. 311, 71 Atl. 211.

tial part of the legislative scheme and if not observed will be fatal to an assessment for the improvement.¹

§ 19. Failure to Follow Statute—Unimportant Variances.

When a statute under which a public body makes its contract prescribes special formalities, these must be complied with or the contract will be void. These requirements of the statute must be substantially complied with to render the acts of public officers valid. But such provisions need not be literally performed in unessential particulars, where there has been a substantial compliance which answers the purpose or intent of the statute. The failure therefore to annex a guaranty for the proper performance of a contract in the precise language of the statute is an unimportant variance which does not render the contract invalid.²

¹ People *ex rel.* O'Reilly *v.* Comm. Council, 189 N. Y. 66, 81 N. E. 557.

² People *ex rel.* J. B. Lyon Co. *v.* McDonough, 173 N. Y. 181, 65 N. E. 963.

CHAPTER VII

GIFTS TO PUBLIC BODY TO INDUCE EXERCISE OF POWERS

§ 20. Gifts for Location of Public Buildings.

Where public authorities charged with the duty of locating public structures are confronted with inducements of money aid to erect the structures, provided they are erected in a certain locality, there can be no impropriety or illegality in their taking such offers into consideration in making a choice of location. Nor will such proposed aid be against public policy. Of course, public officials in the performance of their duty should keep perfect freedom of judgment so that public welfare and not the private gain of others shall control their judgments.

If in the selection of a site to locate courthouses or other public buildings, the public officials keep within these limitations, there can be no objection to receiving a donation of land upon which to erect the structure, as a consideration for such selection.¹

Indeed in many jurisdictions statutes have been passed fixing the location of the State House at a certain city provided the inhabitants would subscribe a certain sum of money toward its erection and these subscriptions have been upheld as based upon a sufficient consideration and as not offending public policy.² But where a public official, before his appointment to office in consideration of a

¹ *Stilson v. Lawrence County*, 52 Ind. 213; *Island County v. Babcock*, 17 Wash. 438, 50 Pac. 54; *Wisner v. McBride*, 49 Iowa, 220; *Odineal v. Barry*, 24 Miss. 9.

² *Carpenter v. Mather*, 4 Ill. 374; *State Treas. v. Cross*, 9 Vt. 289.

nominal rental agrees to keep the post office in a certain location so long as he remains in office, such agreement is void since the contract amounts to a sale of the exercise of his judgment for private emolument.¹

It has, however, been held that an agreement by a municipality to locate its city hall and market house at a certain place in consideration of a donation toward the expense of its erection was void as against public policy.²

§ 21. Gifts for Location of Public Buildings—Is it Bribery?

The donation of land or money for the location of public buildings and the erection thereof is in general not to be considered against public policy, and is not bribery.³ In like manner, an offer of money to change the county seat will not be deemed either a bribe or opposed to public policy.⁴

Where the action of the officials in charge of the project is influenced solely by reason of the financial aid given by individuals, the entire scheme will on that account be void,⁵ as in the nature of a bribe. But gifts of this character are not necessarily illegal or contrary to public policy where some advantage results to the public. If there is a degree of public benefit likely to spring out of the enterprise all questions of policy in carrying it out devolve upon the legislative or governing body in whose keeping the discretion to adopt such enterprise is reposed, and the

¹ *Spence v. Harvey*, 22 Cal. 336; *Benson v. Bawden*, 149 Mich. 584, 113 N. W. 20.

² *Edwards v. Goldsboro*, 141 N. C. 60, 53 S. E. 652.

³ *State v. Elting*, 29 Kan. 397; *Dishon v. Smith*, 10 Iowa, 212; *Commrs. v. Hunt*, 5 Ohio St. 488; *Adams v. Logan County*, 11 Ill. 336.

⁴ *Stillson v. Lawrence County Commrs.*, 52 Ind. 213; *Hall v. Marshall*, 80 Ky. 552.

⁵ *Edwards v. Goldsboro*, 141 N. C. 60, 53 S. E. 652.

exercise of discretion by such public body cannot be controlled by the courts.¹

Accordingly, a note given to a board of education to purchase a library site or books in the discretion of the board is valid as a gift and does not influence the action of the board in the performance of its official duty and is not against public policy where the board had previously determined the question, but were unable to proceed with their project owing to lack of funds which were thus supplied.² And a municipality may deed land to the State for an armory, reserving the right to use the armory for purposes of drill by its police and fire departments.³

§ 22. Gifts to Public Body in Consideration of Street Improvement.

A gift of money or land as consideration for laying out of a street or highway or for the location of it in a particular place cannot in the absence of proof of corrupt action, be regarded as a bribe to influence official action or as against public policy.⁴ The location and laying out of highways is a matter of public concern and projects relating to such affairs are in the public interest and promotive of the public welfare. So, an offer to contribute money by a private citizen to pay a portion of the cost of laying out a street is not opposed to public policy, but, on the other hand since it diminishes the expense falling upon the public is a gain for the public. Its acceptance apart from direct proof of fraud or corruption, cannot be considered to be a bribe to influence the general governing

¹ *State v. Mayor of Orange*, 54 N. J. L. 111, 22 Atl. 1004.

² *Kansas City Sch. Dist. v. Sheidley*, 138 Mo. 672, 40 S. W. 656.

³ *State ex rel. v. Turner*, 93 Ohio St. 379, 113 N. E. 327.

⁴ *State ex rel. v. Mayor of Orange*, 54 N. J. L. 111, 22 Atl. 1004, 14 L. R. A. 62.

body to whom is delegated the discretionary power of laying out and locating streets.¹ While earlier cases seem to have taken the view that mere proof of a gift would be sufficient to move the courts to interfere with the exercise of such discretion,² the later and more modern opinion is that the gift is valid and not contrary to public policy.³ A mere offer to donate so much of an owner's land as is contemplated to be taken in a proceeding to widen the street cannot be considered to invalidate the decision of the public body to make the widening.⁴ It is only when the acceptance is upon a condition which amounts to a surrender or barter of some legislative discretion,⁵ or when fraud or corruption is shown that such a donation is invalid.

¹ *Idem.* See cases cited.

² *Comm. v. Cambridge*, 7 Mass. 158; *Smith v. Conway*, 17 N. H. 586.

³ *Patridge v. Ballard*, 2 Me. 50; *Crockett v. Boston*, 59 Mass. 182; *Ford v. North Des Moines*, 80 Iowa, 626, 45 N. W. 1031; *Springfield v. Harris*, 107 Mass. 532; *Townsend v. Hoyle*, 20 Conn. 1; *Pepin Co. v. Prindle*, 61 Wis. 301, 21 N. W. 254.

⁴ *Crockett v. Boston*, *supra*.

⁵ *Penley v. Auburn*, 85 Me. 278, 27 Atl. 158.

CHAPTER VIII

POWER TO ENGAGE IN OR TO AID PRIVATE ENTERPRISE

§ 23. Engaging in Private Enterprise—Rule Stated.

Municipalities are agents of the State intrusted with certain powers of government to be exercised for public uses and purposes and they must keep within the limits of delegated power and function only for the purposes and objects for which they were created.

These governmental purposes not only include the protection of life, liberty and property, but also the promotion of health, convenience, comfort and welfare of its inhabitants. Municipalities possess no power to invade the sphere of purely private enterprise and engage in commercial activities wholly disconnected from public needs and public purposes. Public moneys may only be appropriated and expended for a public purpose. It is, indeed, difficult to say where governmental purposes and functions end and private enterprise begins. Our views in this respect have been altered very considerably in the past few decades of progressive and energetic activity to keep pace with the needs of our growth and the ability of inventive genius in this age of invention to supply them. The wants of to-day are entirely different from those of a century ago, and as another century of development is put behind us in the onward march of events, new needs undreamed of now will lie before the governmental authorities of the future. *Tempora mutantur et*

nos mutamur in illis. The genius of our government is the ability to temporize.

§ 24. History of Development of Municipal Enterprise.

It is not so long ago in the story of our advance that decisions may be encountered which deny even the right to supply water to our municipalities, as a power to be implied from general powers, and that in order to be able to furnish to its inhabitants so great a need as water, the power to supply it must be conferred in express terms. It was said that the matter of furnishing water was the duty of each individual. But this could not with wisdom and sense be said to-day. Each citizen could not build a well in his back yard, for modern apartment houses in our large cities with their numberless tenants leave no back yard of any size, and if the individual could dig a well, the supply would be utterly insufficient from subterranean sources with his neighbors every few feet away tapping his supply. And if he could obtain a supply, it would probably be polluted and poisoned by gas seeping through the ground from leaking gas mains so that it would be utterly unfit for human consumption. What answer would a city which consumes as does the city of New York, six hundred fifty million gallons daily make to such a ruling? Her necessities would compel the courts to imply such a power from the most general grant of powers. Circumstances would compel the courts to alter their views in the face of a controlling necessity. The growth in these public uses has been exceptional. From the private well and the town pump, was evolved the private water company which has almost wholly disappeared, and municipal ownership and operation of waterworks is everywhere the recognized rule under

controlling and imperative necessity which makes them essential to the very existence of our cities in these times. In the same way from the candle and the paper lighter to the kerosene lamp and beyond it to gas and electricity, our towns and cities have grown to the point where it is recognized that the legislatures have full power to authorize the ownership and erection of lighting plants. And so essential is the use of this commodity that from very general powers to furnish a supply to the municipality, the courts have held municipalities were entitled to sell the products of these plants to its inhabitants. In like manner, the power to furnish gas and electricity to light its streets and to sell to its inhabitants for lighting purposes has been declared to be impressed with a public use for which public money could be lawfully expended. And while the courts were wrestling with the problem as to whether the city of Toledo could engage in the municipal ownership and operation of natural gas works to furnish gas for public and private use and consumption and to thereby furnish fuel to its inhabitants for heating purposes, every one of these municipalities engaged in selling electricity for lighting purposes without amendment of charter by the legislature, but through the agency of invention, were put into the heating business by the invention of electric heaters, electric stoves and irons, curlers, toasters and other uses ad lib. Although it was not intended that these municipalities should sell heat but only light, the current sold is used for all purposes of heat and light which modern invention admits.

But in the case referred to,¹ it was determined that heat

¹ State *ex rel.* Atty.-Gen. *v.* Toledo, 48 Ohio St. 112, 26 N. E. 1061, 11 L. R. A. 729.

was an indispensable agency of public health, comfort and convenience of every inhabitant of our cities and that the imposition of taxes to meet the cost of erecting a plant to supply gas for heating uses was a public purpose, even though a new object of municipal policy.

It was also determined in deciding whether the objects for which taxes are assessed, constitute a public or a private purpose, that the courts cannot leave out of sight the progress of society, the change of manners and customs, the development and growth of new wants, natural and artificial, which may from time to time call for a new exercise of legislative power, and that courts are not bound by the objects for which taxes have been customarily levied in other times.

Similarly, under stress of great public necessity the statute which authorized the city of New York to build its subways was upheld. That city, built on a narrow strip of island, with all of its business and congestion at one end, was in dire distress for need of transit facilities. The Rapid Transit Act authorized the formation of a company to construct a subway. The Commissioners appointed laid out the route and tried to induce private capital to construct and operate it. But private enterprise and capital would not construct it and the city either had to build it itself or go without it despite its needs because of the crowded and congested condition of travel. Since the work was authorized by the legislature, was necessary and required for the welfare of the people, and was public in character, the act was sustained as promoting a lawful municipal purpose.¹ To those who know the situation in the city of New York, it is manifest

¹ *Sun Print. & Pub. Ass'n v. Mayor of New York*, 152 N. Y. 257, 46 N. E. 499.

that it would have been a calamity of the highest degree had the legislation not been sustained.

Thus the providing of water, light, heat and impliedly fuel and transportation have been sustained as legitimate objects of municipal enterprise each impressed with a public purpose for which money raised by taxation may be expended.

§ 25. History of Municipal Enterprise—View of Courts—Too Narrow.

The evolution of the engaging by municipalities in commercial enterprise seems to be by challenge. One case denies a municipality the right to engage in the business of plumbing and suggests the utter impossibility of implying the right to sell ice as an incident to the power to supply water.¹ But straightaway it is decided and in the same jurisdiction that ice is but water in another form and it is necessary to the health of the people of the southern climate of Georgia, and at once the municipality is set up in the ice business.² Another case allows the sale of natural gas or fuel and derides by challenge the possibility of municipalities engaging in the business of mining and selling coal.³ Immediately but quite independently the query is answered in another case, if ice is necessary to the health of Georgia, a southern climate, coal is necessary to the health of Maine, a northern climate.⁴ The Ohio court argues that coal can be transported by ordinary channels of transportation and at slight expense, while natural gas must be carried through pipes in the streets and by machinery and plant purchased at great expense beyond the enterprise

¹ Keen *v.* Waycross, 101 Ga. 588, 29 S. E. 42.

² Holton *v.* Camilla, 134 Ga. 560, 68 S. E. 472.

³ State *ex rel.* Atty. Gen. *v.* Toledo, 48 Ohio St. 112, 11 L. R. A. 729.

⁴ Laughlin *v.* Portland, 111 Me. 486, 90 Atl. 318.

and capital of the individual.¹ Immediately the Maine court, but quite unconscious of the other court's attitude, answers that coal fuel is a monopoly and that the use of the streets for pipes is not the test by which the use is to be determined to be public and it raises a question about grocery stores, meat markets, and bakeries.²

The city of New York starts in the bus business and it is declared to be without power because not granted expressly to it by the legislature and, in turn, the New York court raises the question that if the Home Rule Act will authorize the omnibuses, it will authorize municipal markets, municipal department stores, municipal drug stores.³ If these queries are prophetic as in the case of ice and coal, whither is municipal enterprise bound?

Courts in these cases seem to have become obsessed with the subject in hand, and while holding it to be a valid exercise of municipal power close the bars to every other possible commodity, as an object of municipal enterprise. They lay down tests which are somewhat artificial and questionable.

If the municipalities have the power to regulate the sale of liquor by establishing municipal dispensaries and taking over the exclusive sale of it,⁴ why cannot they take over the sale of drugs and narcotics? Indeed, there is a much stronger reason in the case of these drugs, for when cocaine enters the human system, morality leaves it. If coal can be sold to citizens, why not wood which is just

¹ State *ex rel.* Atty. Gen. *v.* Toledo, *supra*.

² Laughlin *v.* Portland, *supra*.

³ B'klyn City Ry. Co. *v.* Whalen, 191 N. Y. App. Div. 737, 229 N. Y. 570, 128 N. E. 215.

⁴ Plumb *v.* Christie, 103 Ga. 686, 30 S. E. 759; Farmville *v.* Walker, 101 Va. 323, 43 S. E. 558.

as essential for fuel. If coal and gas and water, why not milk and bread. No situation has been quite so acute or so embued with necessity as has been the milk and the ice situation in our larger cities in recent years. The entire comfort and welfare of the general population is dependent during the very warm summers upon a proper ice supply, and the welfare and comfort of the infant population depend upon a healthful milk and ice supply. The young are the assets of the State, its future citizens upon whom its future welfare will depend. Can it be said that where private enterprise fails through strikes or otherwise that the municipality cannot step in under appropriate legislation to prevent infant mortality and engage in the business of ice and milk supply by contracting for its delivery and taking charge of its distribution or by municipal herds and ice plants. Indeed, almost every municipality which runs a penitentiary or reformatory has a municipal herd, and if it is lawful for one use, it is for the other and, in the latter case, it cannot be justified under a claim of police power as it is not at all essential to the exercise of its police power that it shall maintain cows for a milk supply. And it would seem an anomaly of the deepest sort to say that a city could lawfully maintain a herd to supply pure milk to criminals but it could not maintain one for the innocent babes who inhabit it, when the obligation so to do arises. To say that a supply of bread under proper exigencies may not be furnished by a municipality is likewise untenable.

Yet it is not necessary because municipalities have these powers that they should use them, but it is still competent and proper to maintain that the powers exist. They are not new powers but simply new exercises of powers always possessed.

Everyone is familiar with the passage of the Home Rule provisions of the Ohio Constitution and the Home Rule Act of New York and what was claimed by their sponsors could be accomplished under them. The courts should exercise caution in imposing limitations upon the application of legislative acts of this character by invoking hidden prohibitions of the Constitution.

There is altogether too unscientific a handling of this entire question and an utter disregard in most cases of the essential bases upon which its proper solution rests. These suggestions are urged not so much to uphold or encourage a practice of using these powers as they are for a recognition of the existence of these powers and of the principles upon which they rest. Granting the need in any community of any one of the essential commodities of life within the general classification of fuel, food and clothing, it must be admitted that as long as they are offered without discrimination to the general public they are a proper public use for which public moneys may be appropriated, and it is indeed a rather feeble government which must acknowledge a lack of power to furnish them. As to the exercise of this power in competition with private enterprise or when private enterprise can act, unhesitatingly the power should not be used. It must be admitted that the State and nation possess as does every sovereign possess these powers as a part of its war power to preserve its existence. Can we say in times of peace when, in our present complex civilization, our cities necessarily depend upon these articles of general necessity to be furnished from outside, that when the preservation of lives of our inhabitants depends upon a proper supply of these commodities that the State or its agencies cannot furnish them?

§ 26. Proper Objects of Home Rule Should be Attained.

The State as the sovereign has taken of its omnipotence in the matter of local self-government and conferred it upon municipalities as absolutely as it was possessed by itself.

Many home rule acts have been passed in various States conferring upon localities the time-honored function of local self-government. Some constitutions confer this power absolutely. The beneficent purposes of these acts should be upheld when possible. They are remedial in their nature and should be liberally construed for the benefit of the public.

While agreeing in the result that moving picture theatres are not a public purpose for which taxes might be imposed,¹ it cannot be contended that moving pictures may not be used for educational purposes and paid for out of the tax purse. They constitute one of our most impressive educational mediums and, no doubt, the purely pleasurable and emotional side of this modern enterprise will some day give way to a larger development of it upon the educational side when they will come into general use for exposition in municipal auditoriums; and certainly such a purpose would be public and would be authorized under the broad powers of local self-government conferred by the Home Rule Acts. The particular is included in the general, and when the legislature intended specific enterprises should be undertaken under these broad general powers, the courts should be slow to curtail or suppress them. In like manner, if the broad powers conferred under the New York Act intended the right to engage in the operation of omnibuses, the courts should not send the city to the legislature to obtain the special right already conferred

¹ State *ex rel.* Toledo *v.* Lynch, 88 Ohio St. 71, 102 N. E. 670.

and so intended by general language, unless forced so to do by defects or omissions in the statute.

§ 27. Views of Justice Holmes—A True Basis.

The dissenting opinion of a distinguished jurist in the Massachusetts fuel decision,¹ states the case squarely, when read in conjunction with our concept of government which is founded on the principle of individualism.

Mr. Justice Holmes declared that when money was taken to enable a public body to offer to the public without discrimination, an article of general necessity, the purpose is no less public when that article is wood or coal than when it is water, gas, electricity or education, to say nothing of the cases of paupers or of taking of land for railroads or public markets.

There is and always will be a public necessity impressed upon certain articles of fuel, food or clothing² and as the stress of times grow, with increasing populations, greater tendency to congregate in cities, disregard of agricultural and engaging in industrial pursuits, the necessity will grow. Cities depending upon outside for food supply may be ultimately forced in the interest of keeping themselves going to take hold of the marketing of these commodities which are essential to their own existence. Civilization is becoming more complex and, as the complexity increases, who can foresee the needs of the future and limit the exercise of powers which those needs will demand? This reasoning of this learned jurist is neither paternalistic, socialistic, nor altruistic. It supports the doctrine of individualism and laissez faire and is expressed in view of the exigencies of to-morrow, unblinded by visionary

¹ Opinion of Justices, 155 Mass. 598, 30 N. E. 1142.

² See *Munn v. Illinois*, 94 U. S. 113, 126, 24 L. Ed. 77, aff'g 69 Ill. 80.

generalities, or doubts about the wisdom of the people and of their ultimate rights to exercise their own powers.

§ 28. Limitations on Municipal Enterprise—Rules Controlling Limitations.

There is, however, a proper line at which these powers must be arrested. It is not the artificial boundary attempted to be made by some of the courts after they themselves have crossed their own line with their own favorite commodity. It is not enough to say that electricity, water and gas can only be produced by coöperation of all the populace in the erection of plants and works because of the expense which individuals could not bear. The cost will not make the use public. It is not a proper test to call these commodities public because permission must be obtained to convey them through pipes and wires, under or over the public streets. As matter of fact, if food or fuel was sent through the pipes by pneumatic or other agency, it would by this operation become public according to this test.

If the object is private, if the business is purely private, not impressed with real public necessity, the public have no power to invest public moneys in such speculative ventures or strictly commercial endeavors. The commodity must be one of general public necessity, convenience or welfare and it must be supplied without discrimination when private enterprise fails. These are the only appropriate tests. Difficulty of supply is an artificial barrier invented by the courts under legislative urging to meet what the legislature deemed a public emergency when it called upon the court a second time for its opinion.¹ It was also

¹ See Massachusetts fuel cases, preceding sections.

urged by the Maine court¹ that grocery stores, meat markets and bakeries will not fall within its test of difficulty to obtain supply. Difficulty is not the test either of the power or the public use. What could be more necessitous than the ice and milk supply which certainly fall within the general group of commercial activities mentioned. If coal, why not ice? Under the reasoning of the Maine court, ice would immediately become both difficult and necessary. If electricity which comparatively few use, why not bread which all use? The test should be the common sense view of Justice Holmes when private enterprise fails. He, with clear vision and confidence in his countrymen, meets the issue on logical grounds undismayed by fear of socialistic legislation and so-called communistic activities of our cities.

§ 29. Implied Power to Engage in Private Business.

Municipalities possess no implied power to engage in private enterprise or business.² In the exercise of its private or business functions, it must have authority either express or necessarily implied to empower it to engage in the private or business activities which municipalities may be authorized to assume.³ It has been held under a narrow interpretation of Home Rule grants that the right to engage in private enterprises will not be implied from a general grant of power such as general welfare or home rule provisions of its charter or statutes.⁴ No implica-

¹ See cases, preceding sections.

² *Brooklyn City Ry. Co. v. Whalen*, 191 N. Y. App. Div. 737, 229 N. Y. 570, 128 N. E. 215; *Re Municipal Fuel Plants*, 182 Mass. 605, 66 N. E. 25; *Opinion of Justices*, 155 Mass. 598, 30 N. E. 1142; *Att'y Gen. v. Detroit*, 150 Mich. 310, 113 N. W. 1107.

³ *State ex rel. Att'y Gen. v. Toledo*, 48 Ohio St. 112, 26 N. E. 1061, 11 L. R. A. 729.

⁴ *State ex rel. Toledo v. Lynch*, 88 Ohio St. 71, 102 N. E. 670; *Brooklyn City Ry. Co. v. Whalen, supra*. See § 23-28 *ante*.

tion can be drawn of a grant of power to municipalities to assume those activities which according to our conception of government founded on the principle of individualism is left to the enterprise of private individuals,—a system under which all of our success as a government industrially, commercially and financially has been accomplished.¹ They may not, therefore, erect buildings to rent or lease them or engage in the sale of commodities unless expressly thereunto authorized by legislative sanction and then only when the purpose is public.²

§ 30. Power to Authorize Municipal Enterprise Exists in State Legislature.

By the great weight of authority, the power to authorize the municipality to engage in the business of supplying commodities which may be impressed with a public necessity and constitute a public use clearly exists in the legislature, as the repository of the sovereign power of the State, but such power must be conferred upon municipalities before the latter can exercise the power, and until so authorized they possess no implied power to engage in business in competition with private persons engaged in the same business.³ These authorities differ as to the test to be applied in determining what constitutes a public use.⁴

¹ *Laughlin v. Portland*, 111 Me. 486, 90 Atl. 318; *Brooklyn City Ry. Co. v. Whalen*, *supra*.

² *State ex rel. Att'y Gen. v. Toledo*, 48 Ohio St. 112, 11 L. R. A. 729; *Heald v. Cleveland*, 19 Ohio Nisi Prius N. S. 305; *Sugar v. Monroe*, 108 La. 677, 32 So. 961; *Warden v. New Bedford*, 131 Mass. 23; *Kingman v. Brockton*, 153 Mass. 255, 26 N. E. 998; *Bates v. Bassett*, 60 Vt. 530, 15 Atl. 200.

³ *Brooklyn City R. Co. v. Whalen*, 191 App. Div. 737, 229 N. Y. 570, 128 N. E. 215; *Sugar v. Monroe*, 108 La. 677, 32 So. 961; *Bates v. Bassett*, 60 Vt. 530, 15 Atl. 200; *Worden v. New Bedford*, 131 Mass. 23; *Milligan v. Miles City*, 51 Mont. 374, 153 Pac. 276; *Atty. Gen. v. Detroit*, 150 Mich. 310, 113 N. W. 1107; *Hunnicutt v. Atlanta*, 104 Ga. 1, 30 S. E. 500; *Laughlin v. Portland*, 111 Me. 486, 90 Atl. 318.

⁴ *Laughlin v. Portland*, *supra*; *Re Municipal Fuel Plants*, 182 Mass. 605, 66 N. E. 25. See preceding sections, this chapter.

When authorized by the legislature to engage in these activities, the money raised by municipalities and used by them in conducting the enterprise is engaged in a public purpose.¹ When money is appropriated and expended by municipalities in the exercise of these business powers and functions, the fact that some incidental benefit is conferred upon individuals is not an objection to the existence or exercise of the power so long as the main purpose of the expenditure is to subserve a public municipal purpose.² If the primary object of the expenditure is to serve some private end, it is illegal although incidentally it may serve some public purpose. But if the primary object is to serve some public municipal purpose, the expenditure is legal, notwithstanding it also involves as an incident an expense which standing by itself would be illegal.³ Thus while a municipality might not erect a building to rent or lease, where it had an old building useless for public needs, because superseded by a new one, it may lawfully and in the exercise of prudence and a lawful regard not to sacrifice its property expend money upon it so as to put it in condition for rental purposes.⁴ If a municipality is without power to erect a steam plant and engage in the sale of power, its action in expending money for such a purpose would be illegal, but where it has authority and has erected a steam plant which produces a surplus of steam, it may lawfully sell such surplus power, although primarily it could not have erected a plant for such a purpose.⁵ While a municipality may

¹ Laughlin *v.* Portland, *supra*.

² Bates *v.* Bassett, 60 Vt. 530, 15 Atl. 200; Daggett *v.* Colgan, 92 Cal. 53, 28 Pac. 51; Milligan *v.* Miles City, 51 Mont. 374, 153 Pac. 276.

³ Bates *v.* Bassett, *supra*.

⁴ Bates *v.* Bassett, *supra*.

⁵ Milligan *v.* Miles City, 51 Mont. 374, 153 Pac. 276.

supply and sell water to its inhabitants under a grant of authority to erect waterworks or provide a supply of water, it may not enter upon the business of selling the water to inhabitants of neighboring municipalities, as this becomes a private enterprise in which the public may not engage without express authority from the legislature.¹ For the same reason, municipalities are denied the power to engage in the business of selling light for private use in the absence of express grant of power,² but this power should be readily inferred from general powers.³ The power to engage in the business of selling ice will also be inferred from the grant of power to supply pure and wholesome water, since ice is merely a variant form of water.⁴ But powers thus granted are not unreasonably extended. A grant of authority to repair streets under its charter will not imply a power to operate a stone quarry outside of its corporate limits.⁵ Exclusive grant of power to one person to run omnibuses is not a valid exercise of a power to license, tax and regulate omnibuses.⁶ Nor will a municipality by implication from a general grant of power be deemed authorized to make a contract which is in effect a pledge of its credit to support a private enterprise.⁷

¹ *Childs v. Columbia*, 87 S. C. 566, 70 S. E. 296; *Farwell v. Seattle*, 43 Wash. 141, 86 Pac. 217; *Rehill v. Jersey City*, 71 N. J. L. 109, 58 Atl. 175.

² *Baily v. Philadelphia*, 184 Pa. St. 594, 39 Atl. 494; *Swanton v. Highgate*, 81 Vt. 152, 69 Atl. 667.

³ *Crawfordsville v. Braden*, 130 Ind. 149, 28 N. E. 849; *Keenan v. Trenton*, 130 Tenn. 71, 168 S. W. 1053; *Andrews v. South Haven*, 187 Mich. 294, 153 N. W. 827.

⁴ *Holton v. Camilla*, 134 Ga. 560, 68 S. E. 472.

⁵ *Donnable v. Harrisonburg*, 104 Va. 533, 52 S. E. 174.

⁶ *Logan v. Pyne*, 43 Iowa, 524.

⁷ *Scott v. LaPorte*, 162 Ind. 34, 68 N. E. 278, 69 N. E. 675; *Ottawa v. Carey*, 108 U. S. 110, 27 L. Ed. 669.

§ 31. Emergency Which Will Authorize—Engaging in Municipal Enterprise Without Express Authorization.

The inadequacy of the street railway service in a municipality is not a sufficient justification for a municipality to assume a power not granted, nor does such inadequacy create an emergency calling for such immediate action as will authorize a municipality to engage in the business of operating stages or omnibuses, or empower it to contract for automobiles for that purpose. A permanent condition of inadequacy of railroad service is not an emergency which will justify continued operation of stage lines.¹

§ 32. Power to Authorize Municipalities to Engage in Certain Enterprises Does Not Exist.

The legislature has been denied the power to enact legislation which will authorize a town to establish manufacturing and operate them either municipally or by lease to private individuals or corporations,² and in like manner it has been denied the power to engage in commercial enterprise such as buying and selling of coal in competition with private dealers, as such use of money is not for a public purpose,³ unless great inadequacy or difficulty of supply exists.⁴ Where authority has been conferred to supply electricity the power to supply lamps and fittings as incidental was denied.⁵ The power to engage in the moving picture business was denied to cities under the

¹ *Brooklyn City R. Co. v. Whalen*, 191 N. Y. App. Div. 737, aff'd 229 N. Y. 570, 128 N. E. 215.

² Opinion of Justices, 58 Me. 590.

³ *Baker v. Grand Rapids*, 142 Mich. 687, 106 N. W. 208; Opinion of Justices, 155 Mass. 601, 30 N. E. 1142.

⁴ *Re Municipal Fuel Plants*, 182 Mass. 605, 66 N. E. 25; *Contra*, *Laughlin v. Portland*, 111 Me. 486, 90 Atl. 318. But see §§ 23-28, *ante*.

⁵ *Atty. Gen. v. Leicester*, 80 L. J. Ch. 21.

home rule clause of the Constitution of Ohio because such enterprise did not come within the powers of local self-government.¹

The city was denied the implied right in the absence of express legislative authority to engage in the general plumbing business as an incident to its authority to operate a waterworks, and in the course of such business to sell supplies and materials to private citizens and do contract work in placing and installing these upon their premises.²

Nor does a statute which authorizes the holding of real estate empower a municipality to engage in the business of buying and selling real estate or dealing generally in it as principal or broker.³

A general power to hold, purchase and convey real estate, and to make regulations for health, will not authorize a city to lease land for use of picnic parties and people generally.⁴ In the absence of an express sanction from the legislature, a municipality may not engage in the manufacture of brick for paving purposes.⁵ But a city authorized by charter to grade and pave streets and purchase and hold real estate necessary or convenient for its use, has been declared to have power to purchase a stone quarry and manufacture crushed stone.⁶ But under similar statutory power, the right to operate a quarry outside of its limits was declared not to be implied.⁷

¹ State *ex rel.* Toledo *v.* Lynch, 88 Ohio St. 71, 102 N. E. 670.

² Keen *v.* Waycross, 101 Ga. 588, 29 S. E. 542.

³ Hayward *v.* Red Cliff, 20 Colo. 33, 36 Pac. 795; Champaign *v.* Harmon, 98 Ill. 491.

⁴ Bloomsburg Land Imp. Co. *v.* Bloomsburg, 215 Pa. 452, 64 Atl. 602.

⁵ Atty.-Gen. *v.* Detroit, 150 Mich. 310, 113 N. W. 1107.

⁶ Schneider *v.* Menasha, 118 Wis. 298, 95 N. W. 94.

⁷ Donable *v.* Harrisonburg, 104 Va. 533, 52 S. E. 174; Duncan *v.* Lynchburg, 2 Va. Dec. 700, 34 S. E. 964, 48 L. R. A. 331.

§ 33. Sale of Fuel by Municipalities.

In Maine, the reason advanced to sustain the legislation authorizing the municipality to engage in the fuel business, was that fuel was not an ordinary article of merchandise for which there are substitutes, but an indispensable necessity of life. The element of commercial enterprise was entirely lacking. The act did not contemplate embarking in business for the sake of direct profits since the fuel was to be furnished at cost, nor for the sake of indirect gains that might result to purchasers through reduction in price by governmental competition, but simply to enable the citizens to be supplied with something which was a necessity in its absolute sense to the enjoyment of life and health which could otherwise be obtained with great difficulty, and whose absence would endanger the whole community.¹

In Massachusetts, it was declared that the legislature possesses no power to authorize the purchase of fuel by municipalities for resale since this is not a public purpose for which public money could be expended, and they may not be given power by the legislature to buy and sell coal and wood in competition with private enterprise, although such fuel was scarce and high, or because thereby, the cost to their inhabitants could be reduced, unless there was such a local scarcity as created widespread distress which could not be taken care of by private enterprise. Unless the last described circumstances exist, municipalities may not be given power by the legislature to engage in common kinds of business which can be conducted successfully by individuals without the use of any governmental function, and to engage in these businesses

¹ *Laughlin v. Portland*, 111 Me. 486, 90 Atl. 318.

in buying and selling, in competition with private enterprise.¹

§ 34. Power to Authorize Use of Public Money to Erect Homes for Wage Earners—To Acquire Surplus Land in Street Widening and Use Same to Promote Manufacture.

The legislature has no power to use the money of the public or money deposited in the State treasury as unclaimed deposits by savings banks to purchase land and develop it by buildings to be rented, managed and sold by it for the purpose of providing homes for mechanics, laborers or wage earners or for the purpose of improving the public health by providing homes in the more sparsely populated areas of the State for those who might otherwise live in the most congested areas of the State.²

It cannot authorize a municipality to exercise the right of eminent domain in connection with the laying out of a public thoroughfare by taking land adjoining but outside the proposed thoroughfare with a view to its subsequent use by private individuals under conveyance, lease or agreement, although such use may be intended to promote trade and manufacturing by the erection of suitable buildings on the land, the purpose not being public within the constitution.³

The Constitution of New York was amended to permit, in a somewhat parallel situation, the acquiring of surplus lands above the actual needs for a given public purpose, its object being to prevent excessive awards for consequential damages to lands remaining after a taking.⁴

¹ Opinion of Justices, 155 Mass. 598, 30 N. E. 1142; *Re Municipal Fuel Plants*, 182 Mass. 605, 66 N. E. 25.

² Opinion of Justices, 211 Mass. 624, 98 N. E. 611.

³ Opinion of Justices, 204 Mass. 607, 91 N. E. 405.

⁴ New York Const., Art. I, sec. 7.

§ 35. Power to Engage in Certain Enterprises May Be Conferred.

A municipality, while it has the power to erect an auditorium hall and to issue bonds therefor, and may use such auditorium for any lawful purpose and derive revenue therefrom, has no authority to issue bonds to be used primarily for the erection of a building for exposition purposes. Nor may it use portions of such auditorium for lodge rooms, concert halls, show rooms or theaters as purely private enterprise.¹

The theory upon which the erection and maintenance of such buildings is sustained is because they afford a means to exercise the right of assemblage which is an inherent right of the people which has been anciently exercised. The same right has been accorded in other States,² but in one State, the erection was sustained as being a public utility.³ When the legislature grants power to municipalities to sell intoxicating liquors or establish dispensaries for the same, this is a valid exercise of the police power, the promotion of the public good, and money expended is for a public purpose.⁴

§ 36. Usual Powers of Municipalities in America.

The support of schools, the relief of paupers, the maintenance of highways are public uses. Legislation has been declared valid which conferred on municipalities the power to own and operate railroads, lighting plants, power and heating plants, water works for a water supply,

¹ *Heald v. Cleveland*, 19 Ohio *Nisi Prius* N. S. 305.

² *Denver v. Hallett*, 34 Colo. 393, 83 Pac. 1066; *Wheelock v. Lowell*, 196 Mass. 220, 81 N. E. 977.

³ *State ex rel. v. Barnes*, 22 Okla. 191, 97 Pac. 997.

⁴ *Equit. Loan & Security Co. v. Edwardsville*, 143 Ala. 182, 38 So. 1016; *Farmville v. Walker*, 101 Va. 323, 43 S. E. 558; *Plumb v. Christie*, 103 Ga. 686, 30 S. E. 759.

public grounds, parks and recreation centers. They may hold property for charitable purposes, establish municipal lodging houses, public baths and bath houses, public libraries, reading rooms. They may purchase books and may even maintain and regulate public band concerts. They may fill and improve lands for terminal facilities, may improve harbors, docks and terminals and may erect and carry on machine shops, repair shops and garages, the ownership of markets and the ownership and operation of ferries.

In England in addition to engaging in all or nearly all of the foregoing activities, cities and other municipalities have assumed as legitimate public enterprises the operation of slaughter houses, cold air stores, ice plants, buildings for entertainment and music, and they have engaged in the sale of milk and the manufacture of brick. They have built and rented dwellings to laborers. The tendency in both countries is to permit a wider extension of powers and the engaging by cities in many activities heretofore considered solely within the province of private enterprise.¹ Indeed, the nation itself has set the example and led the way both in England and America by establishing a parcel post in competition with the express companies and is using all post routes including the air for this purpose.

§ 37. Aid to Private Enterprise.

Public money can only be expended for public purposes. The giving of aid to manufacturing and other private enterprises to induce them to locate, construct and operate their establishments within the confines of a municipality, will not justify it in raising money by taxation. Taxation

¹ See Dillon, *Mun. Corp.*, § 21.

to pay bonds for the aid and support of private enterprise is not taxation for a public object. It is taxation which takes the private property of one individual for the private use of another.¹

Stock may not be purchased in a manufacturing enterprise, to procure or keep its location within the confines of a municipality. While it tends directly to benefit every citizen by the increase of general business activity, the greater facility of obtaining employment, the consequent increase in population, the enhancement in the value of real estate, and the opportunities for its sale and the multiplication of conveniences, these are not the direct and immediate public uses and purposes to which moneys raised by taxation may be devoted,² and such purchase contracts are therefore void. A statute which authorized a municipality, therefore, to build a dam for the purpose of leasing the water power obtained to manufacturing industries was declared void.³ While the contemplated improvement of the water power on certain rivers if judiciously and properly carried out, might build up a city and add greatly to its general growth, welfare and prosperity, just as would the establishment of any kind of

¹ *People v. Westchester Co. Nat. Bank*, 231 N. Y. 465, 132 N. E. 241; *Loan Assn. v. Topeka*, 20 Wall. (U. S.) 655, 22 L. Ed. 455; *Parkersburg v. Brown*, 106 U. S. 487, 501, 27 L. Ed. 238; *Cole v. LaGrange*, 113 U. S. 1, 28 L. Ed. 896, aff'g 19 Fed. 871; *Missouri Pac. Ry. Co. v. Nebraska*, 164 U. S. 403, 41 L. Ed. 489; *State v. Osawkee Tp.*, 14 Kan. 418; *Central Branch Un. Pac. R. Co. v. Smith*, 23 Kan. 745; *Coates v. Campbell*, 37 Minn. 498, 35 N. W. 366; *Allen v. Jay*, 60 Me. 124; *Deering & Co. v. Peterson*, 75 Minn. 118, 77 N. W. 568; *Minn. Sugar Co. v. Iverson*, 91 Minn. 30, 97 N. W. 454; *Eufala v. McNab*, 67 Ala. 588; *Markley v. Mineral City*, 58 Ohio St. 430; *Manning v. Devil's Lake*, 13 N. D. 47, 99 N. W. 51; *Michigan Sugar Co. v. Auditor Gen.*, 124 Mich. 674, 83 N. W. 625; *Deal v. Mississippi County*, 107 Mo. 464, 18 S. W. 24; *Feldman v. Charleston*, 23 S. C. 57; *Sutherland Innes Co. v. Evart*, 86 Fed. 597; *Bissell v. Kankakee*, 64 Ill. 249, 21 Am. R. 554; *Low v. Marysville*, 5 Cal. 214.

² *Weismer v. Douglas*, 64 N. Y. 91.

³ *Atty. Gen. v. Eau Claire*, 37 Wis. 400.

manufactures which employ capital and labor, yet municipalities have no power to impose taxes to raise money to be devoted to such purposes.¹ A statute which purported to authorize the levy of a tax for the promotion of the establishment and erection of factories to manufacture sorghum into cane sugar, was declared invalid.² In like manner, the power of a municipality to give aid to a grist mill was denied.³ So the attempt at aid to a private cemetery association was in like manner held without power.⁴ But towns and cities may be authorized and empowered to aid in the establishment of irrigation districts.⁵ They may also be authorized to subscribe to aid a turnpike company,⁶ or to purchase bonds in aid of a plankroad company⁷ or one operating a toll bridge.⁸ The improvement of harbors where the object is to promote commerce will sustain taxation as for a public purpose. So will the construction of docks, wharves and possibly of warehouses to be used under governmental authority as part of the facilities for the transportation of merchandise in commercial enterprises and the building of railroads for the same purpose may affect the public so directly as to constitute a public purpose for which money raised by taxation may be expended.⁹

By the overwhelming weight of authority, the power of

¹ *Mather v. Ottawa*, 114 Ill. 659, 3 N. E. 216; *Coates v. Campbell*, 37 Minn. 498.

² *Dodge v. Mission Tp.*, 107 Fed. 827.

³ *Osborne v. Adams County*, 106 U. S. 181, 27 L. Ed. 129; *State v. Adams County*, 15 Neb. 569, 20 N. W. 96.

⁴ *Luques v. Dresden*, 77 Me. 186.

⁵ *Fallbrook Irrig. Dist. v. Bradley*, 164 U. S. 112, 41 L. Ed. 369.

⁶ *Comm. v. McWilliams*, 11 Pa. St. 61.

⁷ *Mitchell v. Burlington*, 71 U. S. 270, 18 L. Ed. 350.

⁸ *Dodge County Commrs. v. Chandler*, 96 U. S. 205, 24 L. Ed. 625.

⁹ *Moore v. Sanford*, 151 Mass. 285, 24 N. E. 323; *Opinion of Justices*, 204 Mass. 607, 91 N. E. 405.

the legislature, unless limited by the Constitution, to authorize municipalities to subscribe for the stock of railroad corporations or make gifts to them, has been sustained on the ground that their construction is for a public purpose.¹ But in the absence of express authority, they have no power to subscribe aid to a railroad or other private enterprise.²

§ 38. Power to Engage in Ownership and Operation of Railroads.

Railroads are highways constructed on rails, affording means of rapid communication between all points of land for the transportation of men and animals and the various products and necessities, raw and manufactured, of industry and commerce, and the instrumentalities by which these and all businesses of life are conducted. They are regulated and controlled by the public authorities, National and State, for the general welfare, and are required to furnish impartial accommodations to all citizens upon uniform rates established by law to that end from time to time.

They are considered in the highest sense to be necessary instruments of commerce and indispensable to the necessities of the complex civilization under which we live.

They, therefore, constitute in its broadest sense a public use and purpose and are none the less highways because a fare is charged in order that their use may be allowed.

¹ *Gelpeke v. Dubuque*, 68 U. S. 175, 17 L. Ed. 519; *Moultrie v. Fairfield*, 105 U. S. 370, 26 L. Ed. 945; *Otoe County v. Baldwin*, 111 U. S. 1, 28 L. Ed. 331; *State v. Nemaha County*, 7 Kan. 542; *Gibbons v. Mobile, etc., R. Co.*, 36 Ala. 410; *Society for Savings v. New London*, 29 Conn. 174; *Butler v. Dunham*, 27 Ill. 474; *Cotten v. Leon County*, 6 Fla. 610; *People v. Mitchell*, 35 N. Y. 551; *Comm. ex rel. Armstrong v. Perkins*, 43 Pa. 400; *Aurora v. West*, 22 Ind. 88.

² *Idem.*

Tolls are charged on turnpikes and plankroads, the ancient means which provided a way of transportation which preceded the modern railroad in the evolution of transportation methods, yet these were always considered public highways.¹ Railroads in like manner constitute public highways and are a public use for which public moneys raised by taxation may be expended.²

A public use is one the purpose of which must be necessary to the common good and general welfare of the people of the public body, sanctioned by its citizens, public in character, and authorized by the legislature.³ The building of subways for the carriage of such passengers as pay the regular fare is, therefore, for a public use, and the legislature has power to order or sanction taxation for these and it may provide for their construction at the expense of the city through other agents than those regularly appointed by the municipality.⁴ When municipalities engage in the ownership and operation of these railroads, they are not exercising governmental functions but merely their private business powers.⁵ Since it is purely a business enterprise, it must be justified if at all under the proprietary powers of the State or political subdivision, and where constitutional provisions indicate a clear purpose that the counties or other political subdivisions should never go into the business of railroad building and forbid donation or ownership in part, such political organization

¹ *Sun Print. & Pub. Assn. v. Mayor of New York*, 152 N. Y. 257, 46 N. E. 499; *New York v. Brooklyn City R. R. Co.*, 232 N. Y. 463.

² *Idem.* *Prince v. Crocker*, 166 Mass. 347, 44 N. E. 446; *Platt v. San Francisco*, 158 Cal. 74, 110 Pac. 304.

³ *Sun Print. & Pub. Ass'n v. Mayor*, *supra*.

⁴ *Prince v. Crocker*, *supra*; *Sun Print. & Pub. Ass'n v. Mayor*, *supra*; *Matter of McAneny*, 232 N. Y. 377.

⁵ *Matter of Board of Rapid Transit Commrs.*, 197 N. Y. 81, 90 N. E. 456, 91 N. E. 1110, 36 L. R. A. n. s. 647; *Atkinson v. Board of Commrs.*, 18 Idaho, 282, 108 Pac. 1046; *New York v. Brooklyn City R. R. Co.*, 232 N. Y. 463.

will not be allowed to do by indirection what was directly prohibited.¹

Statutes which authorize cities to engage in such enterprise are not invalid because they impose a heavy debt upon the cities and to an extent deprive them of the control of their streets, as the legislature may impose these burdens and duties upon municipal subdivisions of the State without their consent. Their powers conferred by the legislature are in no sense a contract and do not become vested rights as against the legislature.²

§ 39. Private Enterprise—Erection of Halls for Public Assembly—What Private Uses Permitted.

Municipalities possess the power to expend money for the purpose of erecting public meeting halls where citizens may exercise their ancient right of assemblage and discussion of public questions.³ These purposes are considered public upon the same footing as the erection of a city or town hall. But municipalities have not the power to expend public money in the erection or maintenance of buildings which contain public halls used principally or mainly for lodge meetings, concerts, lectures, dances and theatrical exhibitions, to the members or promoters of which it is let out for profit,⁴ and this is so even though the building incidentally housed the fire department and town officers.⁵ Accordingly it was declared that municipi-

¹ *Atkinson v. Bd. of Commrs.*, *supra*; *Pleasant Tp. v. Ætna Life Ins. Co.*, 138 U. S. 67, 34 L. Ed. 864; *Underground R. Co. v. New York*, 116 Fed. 952; *Walker v. Cincinnati*, 21 Ohio St. 14; *Taylor v. Ross County*, 23 Ohio St. 22; *Cincinnati v. Dexter*, 55 Ohio St. 93, 44 N. E. 520.

² *Prince v. Crocker*, *supra*; *Matter of McAneny*, *supra*.

³ *Wheelock v. Lowell*, 196 Mass. 220, 81 N. E. 977; *Denver v. Hallett*, 34 Colo. 393, 83 Pac. 1066.

⁴ *Wheelock v. Lowell*, *supra*; *Sugar v. Monroe*, 108 La. 677, 32 So. 961; *Brooks v. Brooklyn*, 146 Iowa, 136, 124 N. W. 868.

⁵ *Brooks v. Brooklyn*, *supra*.

palties may not engage in the business of running a theater in one of the school buildings belonging to it, the reasons assigned being that they possess no implied power to engage in business in competition with private persons engaged in the same business, and further that they cannot erect buildings for speculative or business purposes.¹ While such buildings when lawfully erected for a public purpose may be used casually and incidentally to serve a private purpose, either gratuitously or for compensation, nevertheless they cannot use such buildings in a manner which is inconsistent with or prejudicial to the main purpose for which they were erected.²

§ 40. Private Enterprise—Erection of Public Buildings—Renting of Same.

Where a city has a public building already erected which is larger than its present needs for municipal purposes, it may allow portions of such buildings to be used for private purposes for the time being, either for a stipulated rent or gratuitously.³ In erecting a public building, it may also make reasonable provision for probable future wants and need not limit the size of it to actual existing needs.⁴ But municipalities possess no implied power to expend public money in acquiring land or in improving lands they own in order to rent for income⁵. The power of taxation

¹ *Sugar v. Monroe*, 108 La. 677, 32 So. 961.

² *Sugar v. Monroe*, *supra*.

³ *Worden v. New Bedford*, 131 Mass. 23; *Wheelock v. Lowell*, 196 Mass. 220, 81 N. E. 977; *Sugar v. Monroe*, 108 La. 677, 32 So. 961; *Biddleford v. Yates*, 104 Me. 506, 72 Atl. 335; *Gottlieb K. Co. v. Macklin*, 109 Md. 429, 71 Atl. 949; *Palmer v. Albuquerque*, 19 N. M. 285, 142 Pac. 929; *Jones v. Camden*, 44 S. C. 319, 23 S. E. 141; *Bates v. Bassett*, 60 Vt. 530, 15 Atl. 200.

⁴ *Kingman v. Brockton*, 153 Mass. 255, 26 N. E. 998.

⁵ *Brooks v. Brooklyn*, 146 Iowa, 136, 124 N. W. 868; *Sugar v. Monroe*, *supra*; *Wheelock v. Lowell*, *supra*; *Bates v. Bassett*, *supra*; *White v. Stamford*, 37 Conn. 586.

may only be used to raise money for public uses and purposes and this is not such a purpose until expressly so declared by the legislature itself.¹ A municipality may not, therefore, divert from public to private use space in such buildings actually needed by the public and so in use.²

Obedient to these general principles, the right of a city to erect a memorial hall to be used and maintained as a memorial to soldiers and sailors is conceded, but the authority to turn such building over to a post of the Grand Army has been denied as such a purpose is not public and public money may not be contracted away for such a purpose.³ In like manner and in accord with the same principle as applies to public buildings, the right to lease a portion of the public streets to street vendors for market use has been denied.⁴ Where a town has on its hands an old building formerly used for municipal purposes, it may lawfully expend money in repairing it to put it in condition for renting it. While it could not expend the money primarily as an investment in a building to rent it, it may nevertheless prudently and properly expend it for the purpose cited.⁵ Parks are pleasure grounds set apart for the recreation of the public to promote its health and enjoyment. The ground may be used for public libraries, zoölogical gardens and restaurants.⁶ A State capitol may be erected therein.⁷ But the buildings in a park may not be leased for any purpose which departs from these objects without legislative authority.⁸

¹ Kingman v. Brockton, *supra*.

² Chapman v. Lincoln, 84 Neb. 534, 121 N. W. 596.

³ Kingman v. Brockton, 153 Mass. 255, 26 N. E. 998.

⁴ Schopp v. St. Louis, 117 Mo. 131, 22 S. W. 898, 20 L. R. A. 783.

⁵ Bates v. Bassett, 60 Vt. 530, 15 Atl. 200.

⁶ Williams v. Gallatin, 229 N. Y. 248, 128 N. E. 121.

⁷ Hartford v. Maslen, 76 Conn. 599, 57 Atl. 740.

⁸ Williams v. Gallatin, *supra*.

CHAPTER IX

LOANS OR GIFTS OF MONEY OR CREDIT

§ 41. **Loan or Gift of Money to Individual.**

The power in municipalities to borrow money and issue bonds therefor implies power to levy a tax for payment of the obligation incurred. But this power contained in the charter or statute to borrow money will not authorize an issue of bonds unless they are issued for a corporate or public purpose where it is provided as it is under the Constitutions of most of the States of the Union that the power of taxation may not be used by municipalities except for corporate or public purposes.¹ They, therefore, have no power to raise money by public taxation to be donated to persons or corporations as a bonus for developing the water power within its limits or in its vicinity for manufacturing purposes.² In like manner, they have no power to loan to the owners of land whose buildings were burned in a great fire funds with which they may erect new buildings, as such a use of the public moneys is not for a public purpose.³ Nor may they give or loan money to provide destitute farmers with seed grain and grain to feed their stock while putting in crops, and such a use may not even be authorized by statute since it is not a public use.⁴

§ 42. **Payment of Moral Obligation.**

If a State, in carrying out a policy of justice appropriates

¹ *Ottawa v. Carey*, 108 U. S. 110, 27 L. Ed. 669.

² *Idem*; *Peo. v. Westchester Co. Nat. Bk.*, 231 N. Y. 465, 132 N. E. 241.

³ *Lowell v. Boston*, 111 Mass. 454, 15 Am. R. 39.

⁴ *State v. Osawkee Tp.*, 14 Kan. 418, 19 Am. R. 99.

money to pay a debt or to make a contract to repair an injury inflicted upon an individual or a locality, obligatory upon it in honor and justice, this is but part of its legitimate functions and duties as sovereign and the purposes are public.¹ Where a State diverts waters of a river into a canal to the injury of riparian owners and later it endeavors to restore by making improvements in the river bed, under a contract, a portion of the water thus diverted to the use of such owners who had been deprived of it by the act and authority of the State, such an expenditure and the contract made pursuant to it are for a public purpose.² The satisfaction of a moral obligation by appropriating money for exempt firemen is using the money for a public purpose and is valid.³ The legislature of course has full authority to empower a municipality to pay additional compensation to a contractor with the municipality even though no such power existed under its charter.⁴ A municipality may also indemnify its officers for personal liability incurred in the discharge of their official duties even though they exceed their authority.⁵

Claims supported by a moral obligation and founded in justice, where the power exists to create them but is defectively exercised, may be legalized by the legislature and enforced against the State or any of its political subdivisions. So it may authorize a contractor to sue in such a case, for the fair and reasonable value of his work.⁶

¹ *Waterloo Woolen Mfg. Co. v. Shanahan*, 128 N. Y. 345, 28 N. E. 358; *Davis v. Comm.*, 164 Mass. 241, 41 N. E. 292.

² *Waterloo Woolen Mfg. Co. v. Shanahan*, *supra*.

³ *Trustees of Exempt F. Ben. Fund v. Roome*, 93 N. Y. 313.

⁴ *Brewster v. Syracuse*, 19 N. Y. 116.

⁵ *Bancroft v. Lynnfield*, 18 Pick. 566; *Fuller v. Groton*, 11 Gray, 340; *Pike v. Middleton*, 12 N. H. 278; *Sherman v. Carr*, 8 R. I. 431; *Briggs v. Whipple*, 6 Vt. 95.

⁶ *Wrought Iron Bridge Co. v. Attica*, 119 N. Y. 204, 23 N. E. 542.

The legislature does not exceed its constitutional authority when it compels a municipality to pay a debt which has merit in it, even though a statute of limitations has run against it, or to pay back money expended for services performed for the benefit of a city without lawful authority.¹

There is no good reason why the State should be powerless to do justice, or to recognize obligations which are meritorious and to provide tribunals to pass on them.² The legislature likewise has power to require a municipality to audit and pay debts which have not a sufficient legal basis to enforce payment in a court of law, as long as the claim is just and equitable and of a meritorious nature and it matters not that it is not even cognizable in equity.³

But where the municipality never had a legal or moral obligation to pay, payment cannot be compelled by the legislature,⁴ unless there is a public purpose in some way involved in the case.⁵ Such a purpose does not inhere in a claim for expenses incurred by a public officer in defending himself against charges of official misconduct.⁶ And it may not enforce payment of a gratuity or a charity by municipalities.⁷ In this connection, it is to be noted that

¹ *Brewster v. Syracuse*, 19 N. Y. 116; *Brown v. New York*, 63 N. Y. 239; *New Orleans v. Clark*, 95 U. S. 644; *New York v. Tenth Nat. Bk.*, 111 N. Y. 446, 18 N. E. 618; *Friend v. Gilbert*, 108 Mass. 408; *State v. Seattle*, 60 Wash. 241, 110 Pac. 1008.

² *Cole v. State*, 102 N. Y. 48, 6 N. E. 277; *O'Hara v. State*, 112 N. Y. 146, 19 N. E. 659; *Cayuga County v. State*, 153 N. Y. 279, 47 N. E. 288; *Lehigh V. R. R. v. Canal Bd.*, 204 N. Y. 471, 97 N. E. 964; *Munro v. State*, 223 N. Y. 208, 119 N. E. 444. See *Peo. v. Westchester Co. Nat. Bk.*, 231 N. Y. 465, 132 N. E. 241.

³ *Wrought Iron Bridge Co. v. Attica*, *supra*; *Gaynor v. Portchester*, 230 N. Y. 210, 129 N. E. 657; *People ex rel. Dady v. Prendergast*, 203 N. Y. 1, 96 N. E. 103.

⁴ *Chapman v. New York*, 168 N. Y. 80, 61 N. E. 108; *Bush v. Bd. of Supervisors*, 159 N. Y. 212, 53 N. E. 1121; *People ex rel. Waddy v. Partridge*, 172 N. Y. 305, 65 N. E. 164; *Gordon v. State*, 233 N. Y. 1.

⁵ *Stemmler v. New York*, 179 N. Y. 473, 72 N. E. 581; *Sun Print. & Pub. Assn. v. Mayor*, 152 N. Y. 257, 46 N. E. 499.

⁶ *Chapman v. New York*, *supra*.

⁷ *In re Greene*, 166 N. Y. 485, 60 N. E. 183.

in some jurisdictions a claim which is merely a moral obligation is declared to be a gratuity,¹ and as such cannot be enforced.

§ 43. Power to Indemnify Public Officials.

Municipalities have implied power to indemnify their officials against any loss or liabilities which they may incur in a bona fide performance of their duties, even though they exceed their legal rights and authority.² It is one of the ordinary expenses of a municipality to protect and so reimburse its officer who in good faith has exercised the functions and duties of his office, and has incurred a liability thereby. The reason for the rule is to be found in the fact that it is in the interest of good government and the promotion of the public welfare that the power to indemnify and protect be exercised, for if it were not, it would make officials timid and overcautious in the discharge of their duties, especially in the enforcement and maintenance of law and order, and great harm would consequently result to the public service. The power to indemnify reposed in the general governing bodies of our municipalities in this regard is a discretionary one to be exercised or withheld by them as they see fit. Where the conduct of an official is meritorious and grounded in good faith, even though it prove wrongful because authority was exceeded, they may indemnify, and on the other hand, where officials act in bad faith and imprudently and are compelled to pay damages,

¹ *Conlin v. San Francisco*, 99 Cal. 17, 33 Pac. 753, 21 L. R. A. 474, 114 Cal. 404, 46 Pac. 279, 33 L. R. A. 752.

² *Shermann v. Carr*, 8 R. I. 431; *Cullen v. Carthage*, 103 Ind. 196, 2 N. E. 571, 53 Am. R. 504; *State ex rel. Crowe v. St. Louis*, 174 Mo. 125, 73 S. W. 623; *Moorhead v. Murphy*, 94 Minn. 123, 102 N. W. 219; *Pike v. Middleton*, 12 N. H. 278; *State, Bradley v. Hammonton*, 38 N. J. L. 430, 20 Am. R. 404; *Fuller v. Groton*, 11 Gray, 340; *Bancroft v. Lynnfield*, 18 Pick. 566, 29 Am. D. 623; *Gregory v. Bridgeport*, 41 Conn. 76, 19 Am. R. 485.

such payment can be made suitable personal punishment to them by withholding the power of reimbursement, because the acts of the officers were not in the public interest and such conduct ought not be encouraged.¹

But, where a town collector illegally permitted a party liable to taxation to give his note instead of money for taxes which was received and accounted for as money, and such note was paid by the collector because the maker failed to pay the town, this may not be the subject of indemnity. The vote of a friendly majority even at a town meeting will not permit the bestowal of public money upon a delinquent officer or the diversion of public money raised by taxation to satisfy such a purpose. The public can only be taxed for lawful public purposes, of which this is not one, since it is not connected with the exercise by the town of its legal powers.² And, where municipalities are restrained by constitutional provision from making a gift of money to an individual and from incurring indebtedness for other than municipal purposes, it may not be compelled to pay a claim arising under a statute which authorizes the issue of revenue bonds to be paid by taxation to reimburse a city or county officer in the amount of his expenses incurred in defending himself against charges of official misconduct.³ The usual cases calling for reimbursement are those of police officers sued for false imprisonment or other torts committed in the performance of duty, and in such cases indemnification is proper and usual.⁴ So, village trustees

¹ *Shermann v. Carr*, 8 R. I. 431; *Cullen v. Carthage*, 103 Ind. 196, 2 N. E. 571, 53 Am. R. 504; *Moorhead v. Murphy*, 94 Minn. 123, 102 N. W. 219.

² *Thorndike v. Camden*, 82 Me. 39, 19 Atl. 95.

³ *Chapman v. New York*, 168 N. Y. 80, 61 N. E. 108. (See, on the power of the State to make a gift where restrained by constitutional limitation,—*People v. Westchester County Nat. Bank*, 231 N. Y. 465, 132 N. E. 241.)

⁴ *State ex rel. Crowe v. St. Louis*, 174 Mo. 125, 73 S. W. 623; *Cullen v. Carthage*, *supra*; *Moorhead v. Murphy*, *supra*.

will be protected against acts done in discharge of their official duties,¹ or where a public officer's official report results in libel.² An Indian freight agent will be reimbursed for freight paid by him on supplies in a sudden emergency.³

§ 44. Power to Indemnify Where No Public Rights are Concerned.

A municipality has no power to indemnify one against his act which may cause resulting damage to others unless public rights are concerned.⁴ And where a city contracts to buy land for the purpose of widening a street it cannot assume the responsibility of moving back the building for the owner and restoring it nor indemnify him for risks which may arise during its removal, as municipalities cannot indemnify risks for individuals or others,⁵ and they have no power to acquire property for public use by making contracts of this character.⁶

§ 45. Loan of Credit.

Usually by constitutional provision the power to loan its credit or aid individuals by gift is denied to municipal political organizations of the State,⁷ although some Constitutions permit the legislature to authorize such loans of

¹ *Powell v. Newburgh*, 19 Johns. 284.

² *Fuller v. Groton*, 11 Grav, 340.

³ *U. S. v. Stow*, 19 Fed. 807.

⁴ *American Malleables Co. v. Bloomfield*, 82 N. J. L. 79, 81 Atl. 500, aff'd 83 N. J. L. 728, 85 Atl. 167; *Wheeler v. Sault Ste. Marie*, 164 Mich. 338, 129 N. W. 685, 35 L. R. A. N. S. 547.

⁵ *Nashville v. Sutherland*, 92 Tenn. 335, 21 S. W. 674; *Wheeler v. Sault Ste. Marie*, *supra*; *Carter v. Dubuque*, 35 Iowa, 416.

⁶ *Penley v. Auburn*, 85 Me. 278, 27 Atl. 158; *Stewart v. Council Bluffs*, 50 Iowa, 668; *Wheeler v. Sault Ste. Marie*, *supra*.

⁷ *Chapman v. New York*, 168 N. Y. 80, 61 N. E. 108. (Q. V. for history of gift litigation and occasion for constitutional prohibition.) *Coleman v. Broad River Tp.*, 50 S. C. 321, 27 S. E. 774; *Sutherland Innes Co. v. Evart*, 86 Fed. 597.

credit.¹ But a loan of credit is not affected by sharing one-half of the expense of abolishing grade crossings with a railroad company even though the agreement effecting this result takes the form of a promise by the city to assume the entire cost of elevating the tracks on the reciprocal promise of the railroad company to pay back its one-half to the city.² Nor is it a loan of credit to share part of the cost, even though the municipality could require the railroad company to build a viaduct at its own expense. This right will not prevent the municipality from sharing the expense where it is deemed to be just, a question the decision of which rests with the legislative authority of the city.³ So it has been declared that the indorsement of the agreement as to payment of rent on bonds issued by a water company supplying the city with water under a contract is not a loan of credit.⁴ Congress has enacted against the loaning of national credit on public contracts through advance payments to a contractor performing public work by providing that no payments may be made in excess of the value of services already rendered or of articles or supplies delivered in part performance of the contract.⁵ The legislatures of many of the States are under constitutional restrictions in this respect and may not loan the credit of the State. A contract to advance money through interest-bearing warrants which the contractor could use to raise money to aid him in carrying on his work is invalid, even though the contractor agreed to repay the interest on the final adjustment.⁶ A municipality may lawfully make

¹ *Neale v. Wood County*, 43 W. Va. 90, 27 S. E. 370.

² *Brooke v. Philadelphia*, 162 Pa. St. 123, 29 Atl. 387.

³ *Argentine v. Atchison, T. & S. F. R. Co.*, 55 Kan. 730, 41 Pac. 946.

⁴ *Brady v. Bayonne*, 57 N. J. L. 379, 30 Atl. 968; *State v. Great Falls*, 19 Mont. 518, 49 Pac. 15.

⁵ U. S. Comp. Stat., § 6647 (R. S., § 3648); *Fowler v. U. S.*, 3 Ct. Cl. 43.

⁶ *Moran v. Thompson*, 20 Wash. 525, 56 Pac. 29.

and deliver its notes in payment of assessments due in a mutual insurance company in which it has membership and such constitutes neither a loan of its credit, a guaranty nor a gratuity.¹

Bonds issued for local improvements and which are payable out of assessments are not a loan of credit.² The power to borrow money for a public purpose, will not be made the basis of or authorize a loan of credit.³ Nor may a municipality imply the power from a general grant of authority to make a contract which is in effect a pledge of its credit to support a private enterprise.⁴ An issue of bonds, however, made for the purpose of paying a valid stock subscription is not a loan of credit.⁵ In some States the Constitution prohibits the gift or loan of the credit of the State to or in aid of any individual. Such limitation not only prevents the use of the credit of the State in supporting or fostering the growth of private enterprise or business, but makes a State powerless to issue its bonds to pay a bonus to residents who served the Nation in the World War.⁶

§ 46. The Same: Acting as Surety.

Since municipalities may not loan their credit without express legislative authority, they may not by any implied authority from a general grant, act as a guarantor.⁷ Accordingly, these public bodies cannot guarantee the payment of bonds of a railroad company by indorsing

¹ *French v. Millville*, 66 N. J. L. 392, 49 Atl. 465, 67 N. J. L. 349, 51 Atl. 1109.

² *Redmond v. Chacey*, 7 N. D. 231, 73 N. W. 1081.

³ *Chamberlain v. Burlington*, 19 Iowa, 395; *Brenham v. German Amer. Bk.*, 144 U. S. 173, 36 L. Ed. 390.

⁴ *Scott v. La Porte*, 162 Ind. 34, 68 N. E. 278, 69 N. E. 675.

⁵ *Johnson City v. Charleston R. Co.*, 100 Tenn. 138, 44 S. W. 670.

⁶ *People v. Westchester Co. Nat. Bk.*, 231 N. Y. 465, 132 N. E. 241.

⁷ *Scott v. La Porte*, 162 Ind. 34, 68 N. E. 278, 69 N. E. 675.

them, if by its charter it is limited to subscribe for stock and issue bonds for payment.¹

But where the statute authorizes a municipality to obtain money on loan on the faith and credit of the city for the purpose of contributing to works of internal improvement, this permits the municipality to guarantee the payment of the bonds,² since it is not important to the character of the transaction that the money be obtained in the first instance by the railroad company upon the credit of the city.³ The power to sell its negotiable paper will not by implication authorize a guarantee of a promissory note.⁴ Nor will power to acquire suitable water works and to do all things necessary to carry into effect powers conferred, authorize a city to guarantee the bonds of an electric company.⁵ The agreement of a city made in a deed of a right of way for a sewer to so construct the sewer that water would not back upon the grantor's premises is invalid as to such provision, where no express power was given to make such a contract.⁶

§ 47. Acting as Trustee.

Municipalities may act as trustee of a charitable trust where the gift is made for or in aid of some public purpose charitable in its nature, for which it is the legal duty of the municipality to provide and support.⁷ This power to

¹ *Blake v. Macon*, 53 Ga. 172.

² *Savannah v. Kelly*, 108 U. S. 184, 27 L. Ed. 696.

³ *Savannah v. Kelly*, *supra*; *Rogers v. Burlington*, 3 Wall. (U. S.) 654, 18 L. Ed. 79; *Venice v. Murdock*, 92 U. S. 494, 23 L. Ed. 583.

⁴ *Carter v. Dubuque*, 35 Iowa, 416.

⁵ *Lynchburg &c. R. Co. v. Dameron*, 95 Va. 545, 28 S. E. 951.

⁶ *Nashville v. Sutherland*, 92 Tenn. 335, 21 S. W. 674.

⁷ *Barnum v. Baltimore*, 62 Md. 275, 50 Am. R. 219; *Skinner v. Harrison Tp.*, 116 Ind. 139, 18 N. E. 529; *Maxey v. Oshkosh*, 144 Wis. 238, 128 N. W. 899; *Quincy v. Atty. Gen.*, 160 Mass. 431, 35 N. E. 1066; *Chambers v. St. Louis*, 29 Mo. 543; *Delaney v. Salina*, 34 Kan. 532, 9 Pac. 271; *Maynard v. Woodard*, 36 Mich. 423; *Philadelphia v. Girard*, 45 Pa. St. 9, 84 Am. D. 470,

act as trustee does not depend upon express legislative authority, but even without it municipalities may accept a gift of personalty or a dedication of lands for a public purpose, or for a purpose within and germane to the objects for which it was created.¹ But a trust which is not for a public purpose and which does not fall into one or all of the purposes or objects for which the municipality was organized may not be assumed, and no power exists to acquire or in any manner take property for purposes not corporate, or administrative.² A town is without power accordingly to accept a gift to support a clergyman of a particular denomination,³ although such a gift was declared to be within the purposes and objects for which a town was organized.⁴ But where a trust has been created which is repugnant to the proper purposes of municipal existence, this is no ground upon which to declare an otherwise unobjectionable trust void. The municipality cannot be compelled to execute it, but equity will appoint a new trustee to accomplish that end.⁵

7 Wall. 1; *Vidal v. Philadelphia*, 2 How. (U. S.) 126, 11 L. Ed. 205; *Hanscom v. Lowell*, 165 Mass. 419, 43 N. E. 196; *Perin v. Carey*, 24 How. (U. S.) 465, 16 L. Ed. 701.

¹ *Atlantic City v. Atlantic City Steel Pier Co.*, 62 N. J. Eq. 139, 49 Atl. 822; *Atlantic City v. Ass'd Realities Corp.*, 73 N. J. Eq. 721, 70 Atl. 345.

² *Bullard v. Shirley*, 153 Mass. 559, 27 N. E. 766, 12 L. R. A. 110; *Dailey v. New Haven*, 60 Conn. 314, 22 Atl. 945; *Fosdick v. Hempstead*, 125 N. Y. 581; *Maysville v. Wood*, 102 Ky. 263, 43 S. W. 403; *Philadelphia v. Fox*, 64 Pa. St. 169.

³ Holmes, J., in *Bullard v. Shirley*, *supra*.

⁴ Denio, J., in *Williams v. Williams*, 8 N. Y. 525.

⁵ *Vidal v. Girard*, 2 How. (U. S.) 127; *Dailey v. New Haven*, *supra*; *Fosdick v. Hempstead*, *supra*; *McDonogh v. Murdoch*, 56 U. S. 367, 14 L. Ed. 732.

CHAPTER X

CONTRACTS TO INFLUENCE ACTION OF PUBLIC OFFICIALS

§ 48. General Rule.

All agreements which tend to introduce personal influence and solicitation as elements in procuring and inducing legislative action or action by any department of the national government or of the State or any of its political or municipal subdivisions are contrary to sound morals and so are *malum in se* and are void as contrary to public policy.¹

§ 49. Effect on Contract of Influence on Action of Officials.

Contracts for the purchase of the influence of private persons upon the action of public officials either administrative or legislative are against public policy and void.² In order to condemn this class of contracts, it is not necessary to show that they are bad but merely that their tendency is bad.³ It is not essential to their condemnation that the parties shall be guilty of bribery or corruption under the contract. If the performance of the

¹ *Sage v. Hampe*, 235 U. S. 99, 59 L. Ed. 147; *Providence Tool Co. v. Norris*, 69 U. S. (2 Wall.) 45, 17 L. Ed. 868; *Burke v. Child*, 88 U. S. 441, 22 L. Ed. 623; *Elkhart County Lodge v. Crary*, 98 Ind. 238, 49 Am. R. 746; *Lyon v. Mitchell*, 36 N. Y. 235, 93 Am. D. 502; *Milbank v. Jones*, 127 N. Y. 370, 28 N. E. 31; *Mills v. Mills*, 40 N. Y. 543, 100 Am. D. 535; *Winpenny v. French*, 18 Ohio St. 469; *Powers v. Skinner*, 34 Vt. 274, 80 Am. D. 677; *Bryan v. Reynolds*, 5 Wis. 200, 68 Am. D. 55; *Fuller v. Dame*, 18 Pick. 472; *Houlton v. Nichol*, 93 Wis. 393, 67 N. W. 715.

² *Liness v. Hesing*, 44 Ill. 113, 92 Am. D. 153; *Burke v. Child*, 88 U. S. 441, 22 L. Ed. 623; *Brown v. Brown*, 34 Barb. 533.

³ *Crichfield v. Bermudez A. P. Co.*, 174 Ill. 466, 51 N. E. 552; *Dodson v. McCurnin*, 178 Iowa, 1211, 160 N. W. 927.

contract obligations has an evil tendency or furnishes a temptation to use improper means, as where they contemplate high contingent compensation, the contract is illegal as *contra bonos mores*.¹

All agreements for a pecuniary consideration to control the business operations of the government or of the State or one of its subdivisions, political or municipal, are against public policy and void without reference to whether improper means are actually used or are contemplated in their execution. The mere tendency toward evil controls judicial action and it destroys the occasion for temptation and wrongdoing by refusing recognition to any contract which has in it even the likelihood of such a result.² Of course those contracts which obviously and directly tend to bring about results which the law seeks to prevent cannot be made the basis of a successful suit.³ Every public officer is a guardian of the public welfare and, therefore, no transaction growing out of his official service or position can be allowed to enure to his personal benefit. From such transactions, the law will not imply a contract which binds the government.⁴ A contract with the State produced through bribery upon officers who have the power to make it is against public policy and void and cannot be enforced against the State.⁵ In like manner, a contract made through corrupt influences with an agency of the State government is void for similar reasons.⁶ A contract to bring to bear or tending to bring to bear

¹ *Idem*.

² *Oscanyan v. Winchester Arms Co.*, 103 U. S. 274, 26 L. Ed. 539, *aff'g* 15 Blatch. 79.

³ *Sage v. Hampe*, 235 U. S. 99, 59 L. Ed. 147.

⁴ *Davis v. U. S.*, 23 Ct. Cl. 329; *James v. City of Hamburg*, 174 Iowa, 301, 156 N. W. 394.

⁵ *State, Bradford v. Cross*, 38 Kan. 696.

⁶ *Honaker v. Bd. of Education*, 42 W. Va. 170, 24 S. E. 544.

improper influence upon an officer of the United States and to induce attempts to mislead him in the sale of Indian lands is contrary to public policy and void.¹ But a contract to present to the Secretary of the Interior the situation with reference to certain public lands and to do all that might be necessary to have them thrown open to settlement so that filing of claims might be made thereon under the law, affording equal rights to all persons, without any attempt to procure legislation is not void or against public policy unless it is shown that illegal acts or acts of a corrupt tendency were contemplated.² While the State may employ agents or attorneys to enforce and prosecute claims of the State which require the procuring of legislation, no such authority exists in a subdivision of the State to expend its funds to send lobbyists to the legislature.³ But a municipality has power to employ an attorney to appear before the legislature and oppose a division of its territory.⁴ A contract to pay a lawyer to appear before a board of street commissioners and to argue for the laying out of a street, and to obtain as much damages as possible for the land taken does not, as matter of law, contemplate the use of improper influence, or necessarily tend to induce it, and accordingly it is not against public policy, nor does it become so merely because the lawyer in some degree uses his personal influence as chairman of a committee of a political party.⁵

¹ *Sage v. Hampe*, *supra*.

² *Houlton v. Nichol*, 93 Wis. 393, 67 N. W. 715.

³ *Davis v. Comm.*, 164 Mass. 241, 41 N. E. 292; *Denison v. Crawford*, 48 Iowa, 211; *Chesebrough v. Conover*, 140 N. Y. 382, 35 N. E. 633; *Mills v. Mills*, 40 N. Y. 543, 100 Am. D. 535; *Milbank v. Jones*, 127 N. Y. 370, 28 N. E. 31; *Elkhart Lodge v. Crary*, 98 Ind. 238, 49 Am. R. 746.

⁴ *Farrel v. Derby*, 58 Conn. 234, 20 Atl. 460.

⁵ *Barry v. Capen*, 151 Mass. 99, 23 N. E. 735.

§ 50. Purchasing Consents for Street Improvement.

Where abutting property owners sign a petition for a street improvement and thereby ask for legislative action by the general governing body of a municipality they become to a certain extent charged with a duty to the public. The policy of the State requires their uninfluenced and unbiased judgment in initiating a proceeding. Since the rights of the public and of third persons are involved in the action of the signers to such a petition, public policy denies them the right to sell their signatures. Purchased consents are against the policy of the law, since they create injustice to other owners. The fair judgment of all owners and not their greed must decide the question whether they shall be assessed.¹ In like manner, any arrangement or combination made whereby signatures are obtained by a few interested in causing a grading and paving to be done, by paying a consideration therefor either directly or indirectly, is a fraud upon the law, and contrary to public policy.²

And a contract made to pay a sum of money for obtaining such signatures is void and unenforceable.³

¹ State, *Kean v. Elizabeth*, 35 N. J. L. 351; *Doane v. Chicago City R. Co.*, 160 Ill. 22, 45 N. E. 507.

² *Howard v. First Indep. Church*, 18 Md. 451; *Maguire v. Smock*, 42 Ind. 1.

³ *Doane v. Chicago City R. Co.*, *supra*.

CHAPTER XI

ULTRA VIRES CONTRACTS

§ 51. Classification.

Contracts made and entered into by public bodies and which are said to be ultra vires may properly be divided into two general classifications: those which are ultra vires because illegal, and those which are ultra vires because unauthorized merely. The first class are utterly void and will not be enforced by the courts except in those divisible contracts which permit of a severance of the good from the bad features and which will allow of an enforcement of the former. The second class are generally enforced by the courts where executed and the public body has received and retained the benefits of performance, either on the contract itself, upon an implied contract for quantum meruit, or for money had and received, depending upon the character of the particular contract.

Those cases included in the first class are the following:

1. Contracts expressly prohibited by law.
2. Contracts prohibited by law, unless executed in the manner and upon the conditions prescribed by law.
3. Contracts outside of the scope of the objects and purposes of corporate existence or not to be implied from powers expressly conferred.

4. Contracts against public policy.

Those in the second class may be stated to be:

1. Contracts unauthorized because of a defect of power or want of power but whose subject-matter is within the

scope of the objects and purposes of corporate existence, or

2. Contracts invalid merely because the power granted is defectively or irregularly exercised.

§ 52. Contract Prohibited By Law—Receipt of Benefits.

Where powers are denied to a municipality, the intention of the law is that these powers shall not be exercised. It would be a strange anomaly if the exercise of a prohibited power would cause it to be endowed with validity and dissolve the prohibition. Such a result would by repeated usurpations make municipalities the recipients of omnipotence. Their powers would grow by infringement. Because municipalities do forbidden things and make contracts prohibited by public policy will not make such contracts valid. Such a result cannot be accomplished by continued violation of the law. This would make a mockery of the law. Were this permitted, these very violations would have the effect of endowing these bodies with powers which the legislature has denied them. To claim that such a result must follow because the municipalities have received the benefits of a contract is to make an easy route to a nullification of wise measures enacted to protect the taxpayers. The consummation of such violations cannot bring with it the protection of the very law which has been flaunted and violated and thereby create a cause of action on the void contract.¹

In accord with this reasoning, it has been declared that if the legislature expressly prohibits a contract from being entered into at all, or except upon the performance or existence of certain prior conditions or circumstances, such as an

¹ Dickinson v. Poughkeepsie, 75 N. Y. 65.

appropriation to pay the contract compensation; or that an ordinance shall be passed authorizing the work; or that the contract shall be in writing; or that the contract shall be let to the lowest bidder after public advertisement; or that a certificate by the head of department of the necessity of the work or supplies and that an appropriation to pay therefor exists and is outstanding shall be issued;—a contract made in violation of the positive command of the legislature that these or similar circumstances or facts must exist before a lawful contract may be made, can never be made the basis of recovery.¹ And where the policy of the State thus forbids the making of a contract except in the manner and upon the conditions prescribed, no recovery is permitted upon the theory of an implied contract to pay for the benefits received under the prohibited contract.² No recovery is therefore permitted either on the contract or on quantum meruit.³

§ 53. When Sustained so far as Executed.

Where an ultra vires contract is executory, it will not be enforced,⁴ and the law upholds its repudiation by either

¹ *Indianapolis v. Wann*, 144 Ind. 175, 42 N. E. 901; *Newbery v. Fox*, 37 Minn. 141, 33 N. W. 333; *McDonald v. New York*, 68 N. Y. 23, 23 Am. R. 144; *Gutta Percha M. Co. v. Ogalalla*, 40 Neb. 775, 59 N. W. 513; *Reams v. Cooley*, 171 Cal. 150, 152 Pac. 293; *Denver v. Hindry*, 40 Colo. 42, 90 Pac. 1028; *Jersey City S. Co. v. Jersey City*, 71 N. J. L. 631, 60 Atl. 381; *Snipes v. Winston*, 126 N. C. 384, 35 S. E. 610; *Perry Water, L. & Ice Co. v. Perry*, 29 Okla. 593, 120 Pac. 582.

² *Bluthenthal v. Headland*, 132 Ala. 249, 31 So. 87; *Zottmann v. San Francisco*, 20 Cal. 96, 81 Am. Dec. 96; *Reams v. Cooley*, 171 Cal. 150, 152 Pac. 293; *Fox v. New Orleans*, 12 La. Ann. 154, 68 Am. D. 766; *State v. Helena*, 24 Mont. 521, 63 Pac. 99; *Jersey City S. Co. v. Jersey City*, 71 N. J. L. 631, 60 Atl. 381; *McDonald v. New York*, 68 N. Y. 23, 23 Am. R. 144; *Goose River Bk. v. Willow Lake Sch. Tp.*, 1 N. D. 26, 44 N. W. 1002; *McGillivray v. Joint Sch. Dist.*, 112 Wis. 354, 88 N. W. 310.

³ *Anderson v. Fuller*, 51 Fla. 380, 41 So. 684; *Chippewa B. Co. v. Durand*, 122 Wis. 85, 99 N. W. 603.

⁴ *Columbus Water Co. v. Columbus*, 48 Kan. 99, 28 Pac. 1097; *East St. Louis G. L. Co. v. East St. Louis*, 98 Ill. 415, 38 Am. R. 97.

party with impunity.¹ Where, however, a contract has been made by a municipality to supply some commodity such as water, gas, electricity or the like, and the contract is for some reason *ultra vires*, it will be sustained so far as it has been executed as one for the furnishing of the commodity during the pleasure of the municipality. The reason for this rule is that courts should not interfere to destroy the contracts of parties further than some good reason requires. Even where a contract obstructs the legislative or governmental power of a municipality over its subject because it is in the nature of an exclusive franchise or monopoly or in some manner binds the successors of the officers on the legislative side of municipal power, this does not require that a contract shall be held to be void, but rather voidable so far as it is still executory.² The defense of *ultra vires* should not absolve municipalities from adhering to the principles of common honesty,³ and this defense will not be allowed to obtain where it works injustice or a positive wrong.⁴ When the defense, however, is properly interposed, it will be strictly applied in favor of public bodies.⁵ And in these last cases, it may

¹ *McKee v. Greensburgh*, 160 Ind. 378, 66 N. E. 1009; *Greenough v. Wakefield*, 127 Mass. 275, 1 N. E. 413; *Swift v. Falmouth*, 167 Mass. 115, 45 N. E. 184; *Spaulding v. Peabody*, 153 Mass. 129, 26 N. E. 421; *Halstead v. Mayor*, 3 N. Y. 430; *Philadelphia v. Flanigen*, 47 Pa. St. 21; *Alleghany County v. Parrish*, 93 Va. 615, 25 S. E. 882.

² *Columbus W. Co. v. Columbus*, *supra*; *East St. Louis G. L. Co. v. East St. Louis*, *supra*; *Decatur G. & C. Co. v. Decatur*, 24 Ill. App. 544; *Carlyle W. & L. P. Co. v. Carlyle*, 31 Ill. App. 325.

³ *Bass F. & M. Co. v. Parke County*, 115 Ind. 244, 17 N. E. 593.

⁴ *Portland Lumb. & Mfg. Co. v. East Portland*, 18 Oreg. 21, 22 Pac. 536.

⁵ *Cleveland Sch. F. Co. v. Greenville*, 146 Ala. 559, 41 So. 862; *Higgins v. San Diego*, 118 Cal. 524, 45 Pac. 824; *Hope v. Alton*, 214 Ill. 102, 73 N. E. 406; *Citizens Bk. v. Spencer*, 126 Iowa, 101, 101 N. W. 643; *Mealey v. Hagerstown*, 92 Md. 741, 48 Atl. 746; *State v. Murphy*, 134 Mo. 549, 31 S. W. 784, 34 S. W. 51, 35 S. W. 1132.

even set up the defense even though it has received the benefits under the contract.¹

§ 54. Illegal Contract—Recovery on Denied.

The general rule is that courts will not entertain any action brought upon an illegal agreement. *Ex turpi causa non oritur actio*.² Where it is executory, it will not be enforced; and where it is executed, it may not be rescinded. Not only will courts refuse to enforce such a contract but they will not even permit any recovery upon a contract which is illegal or which is against public policy.³ The defense of illegality may be availed of although it is not pleaded, especially where the contract is *contra bonos mores*, and courts of their own motion will be quick to uncover the illegality and use it as a bar to the action.⁴ However, it is declared in some jurisdictions that the defense of illegality must be pleaded in order to be raised.⁵

§ 55. The Same —Invalid in Part—Severance.

Where a contract is challenged as illegal, the general rule applicable is that if the illegal part cannot be severed from the legal part of the contract, it is altogether void and will not be enforced.⁶ But where these parts can be

¹ *Mealey v. Hagerstown*, *supra*; *Balch v. Beach*, 119 Wis. 77, 95 N. W. 132; *Thomas v. Pt. Huron*, 27 Mich. 320; *State v. Pullman*, 23 Wash. 583, 63 Pac. 265.

² *Levy v. Kansas City*, 168 Fed. 524; *Sewell v. Norris*, 128 Ga. 824, 58 S. E. 637; *Henderson v. Palmer*, 71 Ill. 579, 22 Am. Rep. 117; *Honaker v. Bd. of Education*, 42 W. Va. 170, 24 S. E. 544.

³ *State v. Bd. of Commrs. Dickinson County*, 77 Kan. 540, 95 Pac. 392.

⁴ *Crichfield v. Bermudez Asph. P. Co.*, 174 Ill. 466, 51 N. E. 552; *Cansler v. Penland*, 125 N. C. 578, 34 S. E. 683.

⁵ *Ocorr & Rugg Co. v. Little Falls*, 77 N. Y. App. Div. 592, 178 N. Y. 622, 70 N. E. 1104.

⁶ *Casady v. Woodbury County*, 13 Iowa, 113; *Levy v. Kansas City*, 168 Fed. 524; *Crichfield v. Bermudez Asph. P. Co.*, 174 Ill. 466, 51 N. E. 552; *Edwards v. Randle*, 63 Ark. 318, 38 S. W. 343.

severed, whether the illegality be created by statute or by the common law, the bad may be rejected and the good retained.¹ If the promise is to do two things, one legal and the other illegal, the promise to do the legal act will be enforced and the promise to do the illegal act will be disregarded or considered waived.² And it makes no difference whether there are two distinct promises or whether there is one promise that is divisible, or whether the consideration for the two promises is entire or apportionable.³

Where the consideration is twofold, one legal and the other illegal, both supporting one promise, such promise cannot be enforced.⁴

If the consideration is in no way tainted by illegality but some of the promises are illegal, the illegality of those which are bad does not communicate itself to those which are good, except where in consequence of some peculiarity in the contract, its parts are inseparable, or dependent on one another.⁵ And even if one party to the contract performs illegal services, if the other party's promise is in consideration of his performing legal ones only, the contract would be legal and could not be made illegal by misconduct in carrying it out.⁶ The test of legality is in its making. Where accordingly provisions, such as a provision regulating the hours of labor or the kind of labor, that it shall be union labor or shall not be convict or alien

¹ *State v. Wilson*, 73 Kan. 343, 84 Pac. 737; *Hart v. New York*, 201 N. Y. 45, 94 N. E. 219.

² *U. S. v. Bradley*, 10 Pet. (U. S.) 343, 9 L. Ed. 448; *Gelpeke v. Dubuque*, 1 Wall. (U. S.) 175, 17 L. Ed. 520; *McCullough v. Virginia*, 172 U. S. 102, 43 L. Ed. 382.

³ *Greenwood v. Bishop of London*, 5 Taunt. 727.

⁴ *Sedgwick Co. v. State*, 66 Kan. 634, 72 Pac. 284.

⁵ *State, Laskey v. Perrysburg Bd. of Educ.*, 35 Ohio St. 519; *Hart v. New York*, 201 N. Y. 45, 94 N. E. 219.

⁶ *Barry v. Capen*, 151 Mass. 99, 23 N. E. 735.

labor, and kindred provisions, or provisions which oust the courts of jurisdiction, which do not constitute its main or essential feature or purpose are void for illegality or as against public policy, but are clearly separable and severable from the other parts which are relied on, such other parts are not affected by the invalid provision, and may be enforced, as if no such provision had been incorporated in the contract.¹ But when a statute requires all contracts to be let by competitive bids upon public advertisement to the lowest bidder and illegal or invalid provisions are inserted, it must be shown that the inclusion of such provisions in the contract did not enhance the cost, in order to have them disregarded.²

§ 56. Invalid in Part—Severance—Valid Part Enforceable.

Where a public contract is valid in part and ultra vires in part, such invalidity will ordinarily not affect the other provisions or parts of the contract, which are in no way dependent upon the invalid part or provision, and the valid part may be enforced while that which is illegal and invalid may be rejected.³ If the contract is so indivisible that the parts cannot be separated, so that the illegal can be prevented and the legal performed, the entire contract must be declared void.⁴ But in order to defeat the

¹ People *ex rel.* Rodgers *v.* Coler, 166 N. Y. 1, 59 N. E. 716; Cleveland *v.* Clement Bros. Const. Co., 67 Ohio St. 197, 65 N. E. 885.

² De Wolf *v.* People, 202 Ill. 73, 66 N. E. 868.

³ Kimball *v.* Cedar Rapids, 100 Fed. 802; Ft. Dodge Elec. L. & P. Co. *v.* Ft. Dodge, 115 Iowa, 568, 89 N. W. 7; Nebraska City *v.* Nebraska City H. G. L. & C. Co., 9 Neb. 339, 2 N. W. 870; City of Valparaiso *v.* Valparaiso City W. Co., 30 Ind. App. 316, 65 N. E. 1063; Turney *v.* Bridgeport, 55 Conn. 412, 12 Atl. 520; Uvalde Asph. P. Co. *v.* New York, 128 N. Y. App. Div. 210, 198 N. Y. 548, 92 N. E. 1105; Hart *v.* New York, 201 N. Y. 45, 94 N. E. 219; Myers *v.* Penn. Steel Co., 77 N. Y. App. Div. 307.

⁴ Nicholasville W. Co. *v.* Nicholasville, 18 Ky. L. R. 592, 36 S. W. 549; New Orleans *v.* New Orleans Sugar Shed Co., 35 La. Ann. 551; LeFeber *v.* West Allis, 119 Wis. 608, 97 N. W. 203; Kansas City *v.* O'Connor, 82 Mo. A. 655.

whole contract, the invalidity presented must consist of something of more moment than that a small part of the contract is *ultra vires*, for in these cases the right to avail of this defense depends upon the circumstances of the case and it will not be sustained where it works inequity or injustice,¹ provided, of course, that the particular objected to is not prohibited by statute or beyond the objects and purposes for which the municipality was created.²

Under these general principles, it has been declared that a contract for the construction of a sewer and of a sewage disposal plant is severable, so that a recovery may be had for constructing the sewer, although the provision for the disposal plant is void, when it is apparent that the intention was that the two improvements should be separate. In such case, there is nothing in the nature of the sewer which makes its completion in any way dependent upon the construction of the disposal plant, especially where the advertisement refers to "contracts" and the bids for one were kept separate from the other.

In such circumstances, if everything pertaining to the disposal plant were stricken from the contract, there is left a complete contract for the construction of the sewer.³ A contract affecting the rentals for water which granted an exclusive privilege to the operating company is unenforceable as to the monopoly but enforceable as to rentals.⁴ On the other hand, a contract to purchase a water and lighting plant and to settle a valid judgment, where the

¹ *Bell v. Kirkland*, 102 Minn. 213, 113 N. W. 271, 13 L. R. A. N. S. 793; *Coit v. Grand Rapids*, 115 Mich. 493, 73 N. W. 811; *Spier v. Kalamazoo*, 138 Mich. 652, 101 N. W. 846.

² *Bell v. Kirkland*, *supra*.

³ *Uvalde Asphalt Pav. Co. v. New York*, 128 N. Y. App. Div. 210, 198 N. Y. 548; *Hart v. New York*, 201 N. Y. 45, 94 N. E. 219.

⁴ *Kimball v. Cedar Rapids*, 100 Fed. 802; *Monroe W. Wks. Co. v. Monroe* 110 Wis. 11, 85 N. W. 685.

former was ultra vires because the constitutional provision as to sinking funds was violated and the city was without power to purchase, and the parts were not capable of severance, the contract was void in toto and could not be enforced for either object.¹

§ 57. Incurring Valid Debt or Obligation but Exceeding Limit on Power to Incur Indebtedness—Severance.

When a municipality has power to incur a debt or liability to a definite limited extent and makes a promise to pay a larger amount, and the contract is executed by the other party and the municipality has obtained something that it had the authority to purchase, such acts of municipalities in incurring an indebtedness or an obligation in excess of a limit prescribed by the constitution or by law may be given effect up to the limit so prescribed.² In the revision of governmental acts claimed to exceed the limits placed upon governing bodies by the fundamental laws under which they exist, the courts uniformly strive to give effect to such acts so far as is possible without disobeying the restrictions thus imposed, and will hold acts valid up to such limits notwithstanding some excess beyond constitutional or legal limits if the excess can be separated and can be denied effect without defeating the clear and obvious purpose of such limitation.³

¹ *Austin v. McCall*, 95 Tex. 565, 68 S. W. 791.

² *McPherson v. Foster*, 43 Iowa, 48, 22 Am. R. 215; *Stockdale v. Sch. Dist.* 47 Mich. 226, 10 N. W. 349; *Culbertson v. Fulton*, 127 Ill. 30, 18 N. E. 781; *Chicago v. McDonald*, 176 Ill. 404, 52 N. E. 982; *May v. Gloucester*, 174 Mass. 583, 55 N. E. 465; *Winamac Sch. Town v. Hess*, 151 Ind. 229, 50 N. E. 81; *Citizens Bk. v. Terrell*, 78 Tex. 450, 14 S. W. 1003; *Daviess County v. Dickinson*, 117 U. S. 657; *Ætna Life Ins. Co. v. Lyon County*, 82 Fed. 929; *Herman v. Oconto*, 110 Wis. 660, 86 N. W. 681.

³ *McCullough v. Virginia*, 172 U. S. 102, 43 L. Ed. 382; *Detroit v. Detroit City R. Co.*, 60 Fed. 161; *Illinois Trust & Sav. Bk. v. Arkansas City*, 76 Fed.

The only difficulty which the courts have at all had was whether a severance could be made at the dividing line between that which was legal and that which was forbidden, or whether they were bound by the principles which determined whether the duty created by the contract and assumed by the contractor was capable of severance.

But the more modern tendency is to carry out the equitable principles involved in paying for what has been received within permissible limits and accordingly where as in most instances of contract with municipalities their only obligation is the mere payment of money such an obligation is considered in its nature severable, as one dollar is severable from another, and where that is the only obligation questioned or sought to be enforced, it is sufficiently severable without inquiring whether the duty of the contractor under the contract is also capable of division. When the latter's obligation has been fully performed and he finds that for complete performance he can only receive partial payment, it is of no concern to anyone to what part of his services the money paid shall be ascribed. To do this measure of justice to a contractor who in good faith supplies a municipality with things which it has the power to purchase, is in practical effect to pay him a less price for the entire work. And to accomplish this act of equity technical constructions should be discarded, especially where the prohibition is not against purchasing the material or labor or making the contract, but against incurring

271; *Kimball v. Cedar Rapids*, 100 Fed. 802; *Johnson v. Stark County*, 24 Ill. 75; *Briscoe v. Allison*, 43 Ill. 291; *Seofield v. Council Bluffs*, 68 Iowa, 695, 28 N. W. 20; *Thompson v. Indep. Sch. Dist.*, 102 Iowa, 94, 70 N. W. 1093; *Chicago & N. W. R. Co. v. Langlade Co.*, 56 Wis. 614, 14 N. W. 844; *Monroe W. Wks. Co. v. Monroe*, 110 Wis. 11, 85 N. W. 685; *Allen v. Lafayette*, 89 Ala. 641, 8 So. 30; *State ex rel. Hicks v. Stevens*, 112 Wis. 170, 88 N. W. 48.

the indebtedness. It is more equitable and just to pay up to the amount which a municipality had the power to promise to pay than that the contractor should suffer the entire loss of his services.¹

Where the authority to make a particular contract exists and another contract is made beyond the authority of the public body, the substance of the contract within the power of the public body will, after performance by the contractor, be held to be valid notwithstanding the fact that it is coupled with a condition which exceeds the powers of the public body and is unlawful.² Accordingly where the public body had power to make a contract for the improvement of sidewalks and it made such a contract but agreed to pay therefor in bonds which it was without power to do, and the public body received the benefits of performance, justice requires the elimination of the ultra vires conditions from the contract and its enforcement so far as it is lawful.³

Under similar circumstances where the constitutional debt limit was reached by a municipality and it entered into a contract to pave a street and to pay in part and to assess the cost in part against the abutting owners, the contract was severable and it was declared valid as to the provision for the levy of an assessment but invalid and unenforceable in so far as the city agreed to pay for the improvement out of its general fund.⁴ But a contract made in excess of the debt limit for the purpose of installing a fire alarm system does not admit of change by a court of equity so as to imply a grant to the contractor of a franchise to operate it because the express contract has

¹ *McGillivray v. Joint Sch. Dist.*, 112 Wis. 354, 88 N. W. 310.

² *Hitchcock v. Galveston*, 96 U. S. 341, 24 L. Ed. 659.

³ *Hitchcock v. Galveston*, *supra*.

⁴ *Ft. Dodge &c. Co. v. Ft. Dodge*, 115 Iowa, 563, 89 N. W. 7.

failed for this reason, especially where certain of the apparatus was provided by the city, and the wires were in part strung on poles owned by the city.¹

§ 58. Contract Beyond Powers of Public Body and Beyond Scope of Corporate Purposes—Receipt of Benefits.

Public bodies cannot be held liable to pay for the benefits which it may receive under a contract which has been made by it in relation to a subject-matter which is beyond the powers of such public body and outside of the scope of the corporate objects and purposes for which it was created.²

§ 59. Where Want of Power but no Express Prohibition—Receiving Benefits of Performance.

There seems to be a strong current of authority upholding the rule that where a public body receives the benefits of performance under a contract fully performed by the contractor and which the public body had the power to make or which accomplishes some object or fulfills some purpose which is germane to those purposes and objects for which it was created, the public body is bound to pay the reasonable value of what it receives.³ In like manner,

¹ Gamewell F. A. T. Co. v. LaPorte, 102 Fed. 417.

² Thomas v. Richmond, 12 Wall. 349; Merrill v. Monticello, 138 U. S. 673. 34 L. Ed. 1069; Swanson v. Ottumwa, 131 Iowa, 540, 106 N. W. 9; Brooks v. Brooklyn, 146 Iowa, 136, 124 N. W. 868; Hanger v. Des Moines, 52 Iowa, 193, 2 N. W. 1105; Newport v. Ry. Co., 58 Ark. 270, 24 S. W. 427; Hampton v. Logan County, 4 Idaho, 646, 43 Pac. 324; Hovey v. Wyandotte County, 56 Kan. 577, 44 Pac. 17; Minneapolis Elec. T. Co. v. Minneapolis, 124 Minn. 351, 145 N. W. 609; Wells v. Salina, 119 N. Y. 280, 23 N. E. 870; Perry v. Superior, 26 Wis. 64; Nashville v. Sutherland, 92 Tenn. 335, 21 S. W. 674; Murphy v. Jacksonville, 18 Fla. 318, 43 Am. R. 323; Bell v. Kirkland, 102 Minn. 213, 113 N. W. 271; Mullan v. State, 114 Cal. 578, 46 Pac. 670; New Decatur v. Berry, 90 Ala. 432, 7 So. 838; Westminster W. Co. v. Westminster, 98 Md. 551, 56 Atl. 990; State ex rel. St. Paul v. Minn. Trans. Ry. Co., 80 Minn. 108, 83 N. W. 32; Winchester v. Redmond, 93 Va. 711, 52 Pac. 28.

³ Louisiana v. Wood, 102 U. S. 294, 26 L. Ed. 153; Parkersburg v. Brown, 106 U. S. 487, 27 L. Ed. 238; Chapman v. Douglas County, 107 U. S. 348, 27

where a contract, which is ultra vires because unauthorized merely and not prohibited by law, has been fully performed by a municipality, the contractor may not set up the defense of ultra vires but will be bound to perform where he has thus received the benefits of performance from the municipality.¹ So where a municipality loaned money to a hotel company to construct a hotel receiving as security for the loan a mortgage covering the hotel, while this transaction was ultra vires yet the company having received the benefits, the municipality was allowed to enforce the mortgage by foreclosure action.²

But there is authority to the contrary in many jurisdictions that such contracts may not be enforced and that all the municipality is entitled to receive is what it parted with or the amount of funds loaned,³ and that a municipality will be estopped to enforce the performance of a contract under the same or like conditions in which an individual will be estopped.⁴ So, it was held that a bond given by a contractor as an independent undertaking to keep the pavement in repair for a stated period was invalid and unenforceable because unauthorized.⁵

L. Ed. 378; *Argenti v. San Francisco*, 16 Cal. 256; *Nat. Tube Wks. v. Chamberlain*, 5 Dak. 54, 37 N. W. 761; *Chicago v. McKechney*, 205 Ill. 372, 68 N. E. 954; *Schipper v. Aurora*, 121 Ind. 154, 22 N. E. 878; *Turner v. Cruzen*, 70 Iowa, 202, 30 N. W. 483; *Brown v. Atchison*, 39 Kan. 37, 17 Pac. 465; *Ward v. Forest Grove*, 20 Ore. 355, 25 Pac. 1020; *Schneider v. Menasha*, 118 Wis. 298, 95 N. W. 94.

¹ *New York v. Delli Paoli*, 202 N. Y. 18, 94 N. E. 1077; *Mayor v. Sonneborn*, 113 N. Y. 423, 21 N. E. 121; *Buffalo v. Balcom*, 134 N. Y. 532, 32 N. E. 7; *Middleton v. State*, 120 Ind. 166, 22 N. E. 123; *Deering v. Peterson*, 75 Minn. 118, 77 N. W. 568; *St. Louis v. Davidson*, 102 Mo. 149, 14 S. W. 825; *Belfast v. Belfast Water Co.*, 115 Me. 234, 98 Atl. 738, L. R. A., 1917 B. 908; *Hendersonville v. Price*, 96 N. C. 423, 2 S. E. 155; *Mayor of Hoboken v. Harrison*, 30 N. J. L. 73.

² *Fergus Falls v. Fergus Falls Hotel Co.*, 80 Minn. 165, 83 N. W. 54.

³ *Kansas City v. O'Connor*, 82 Mo. App. 655; *City of Portland v. Portland Bituminous Pav. & I. Co.*, 33 Ore. 307, 52 Pac. 28.

⁴ *Portland v. Portland B. P. & I. Co.*, *supra*.

⁵ *Idem*.

The reason behind this last line of decisions is simply that if the contract is invalid as to one of the contracting parties, it is invalid also as to the other,¹ and neither may enforce or bring suit upon the contract. Some authorities ground the liability, on the other hand, in estoppel. They assert that a contract made by a municipality, where there exists a defect of power or even a want of power to so contract, if it is not made in violation of charter regulations or any statute prohibiting it, is not illegal; and if such a contract has been executed and the benefits received and appropriated, the party receiving them is estopped to deny its validity.² This theory also finds support in the proposition that although the contract is not authorized, if the other party has been induced to expend money on the strength of its validity, the public body is liable.³

**§ 60. Where Want of Power but no Express Prohibition—
Receiving Benefits of Contract—Measure of Recovery Permitted.**

Where a municipality receives the benefit of money, labor or property upon a contract made without due formality, or which it had no authority to make, and which it refuses to execute, it will nevertheless be liable to the person conferring the benefit to the extent of the value of what has been received and appropriated unless the contract was prohibited by statute or in violation of public policy.⁴ Public bodies are not permitted to acquire possession of property under a contract which is invalid

¹ *Portland v. Portland B. P. & I. Co.*, *supra*.

² *St. Louis v. Davidson*, 102 Mo. 149, 14 S. W. 825; *State Bd. of Agric. v. Cits. St. R. Co.*, 47 Ind. 407, 17 Am. R. 702; *Allen v. Lafayette*, 89 Ala. 641, 8 So. 30; *East St. Louis v. East St. Louis Gas Co.*, 98 Ill. 415, 38 Am. R. 97.

³ *East St. Louis v. Gas Co.*, *supra*; *Columbus Water Co. v. Columbus*, 48 Kan. 99, 28 Pac. 1097.

⁴ *Schipper v. Aurora*, 121 Ind. 154, 22 N. E. 878.

and plead its invalidity in support of a claim and effort to retain the property in their possession. Where the vendor has acted in good faith and without fraud he will be permitted to recover possession of the property.¹ But where material has been used in the mending of streets so that it cannot be returned specifically there arises no obligation of any kind, not even for reasonable value, although if the material as such was in the possession of the city at time of suit, it would have to return or pay for it.²

Where a municipality receives money under a contract of this character and the money is expended for a lawful corporate purpose such as the laying of sidewalks, the regulating and grading, curbing or paving or other street improvement, for water supply or lighting, for school house or other municipal or public building, although bonds issued in payment of these may not be enforceable, the public body nevertheless having received and retained the benefits must return the money or property or pay its reasonable value. To this end the defense of ultra vires has been considerably broken down by the courts and recovery is permitted on the contract in some instances or estoppel is invoked to preclude the defense of ultra vires; or recovery on quantum meruit or for money had and received is permitted to accomplish what in justice and equity should result.³ The whole purpose of this attitude of the courts is to have municipalities obedient to the general obligation to do justice so that if they receive money which belongs to another by mistake or without

¹ *Chapman v. Douglas County*, 107 U. S. 348, 27 L. Ed. 378; *Bardwell v. South Engine Wks.*, 130 Ky. 222, 113 S. W. 97, 20 L. R. A., n. s. 110; *Stebbin v. Perry County*, 167 Ill. 567, 47 N. E. 1048; *LaFrance Engine Co. v. Syracuse*, 33 Misc. 516.

² *Bartlett v. Lowell*, 201 Mass. 151, 87 N. E. 195.

³ *Idem.*

authority they will refund it. And in similar manner if they obtain property which does not belong to them, they will restore it or if they use it, render an equivalent to the true owner of such property.¹ Where persons part with money or property on the faith of a contract which is ultra vires, the courts in the general desire to effect equity and do justice will permit a recovery of the property or the money specifically or as money had and received.² Such recovery is permitted upon the theory of an implied contract.³ So, if a municipality has power to purchase land for a court house and does so by a contract void because the manner of payment is forbidden, it nevertheless will be required to convey back the property or pay the purchase price.⁴ In like manner where bonds given in aid of a railroad were found unauthorized and void and all recovery upon them was denied, the right to reclaim the capital stock held by the county as consideration for the issue of the bonds will be sustained.⁵ Where, however, the money did not go into the treasury of the municipality and it received no part of the proceeds of the bonds, but instead it was paid directly by the lender to a railroad company in exchange for the bonds of the municipality issued to the railroad without authority so that the contract was ultra vires, and the benefits which the municipality received were only the general benefits conferred on all alike from the construction of the railroad, no

¹ *Argenti v. San Francisco*, 16 Cal. 256; *Allen v. LaFayette*, 89 Ala. 641, 8 So. 30. But see *Bartlett v. Lowell*, cited *supra*.

² *Allen v. LaFayette*, *supra*; *Pimental v. San Francisco*, 21 Cal. 362; *Clark v. Saline County*, 9 Neb. 516, 4 N. W. 246; *Marsh v. Fulton County*, 77 U. S. 676, 19 L. Ed. 1040; *Louisiana v. Wood*, 102 U. S. 294, 26 L. Ed. 153; *Chapman v. Douglas County*, 107 U. S. 348, 27 L. Ed. 378; *Salt Lake City v. Hollister*, 118 U. S. 256, 30 L. Ed. 176, aff'g 3 Utah, 200, 2 Pac. 200.

³ *Argenti v. San Francisco*, 16 Cal. 256; *Allen v. LaFayette*, *supra*.

⁴ *Chapman v. Douglas County*, *supra*.

⁵ *Stebbins v. Perry County*, *supra*.

implied obligation would arise against the municipality to repay the proceeds of the bonds.¹

§ 61. Defective Execution.

If a municipality or other public body has power and authority to make a contract with reference to a given subject-matter, but the contract becomes invalid because the power granted is defectively or irregularly exercised, and the performance of the contract has been effected in good faith by the contractor, the public body is liable on the contract, unless the contract was prohibited by law or in violation of public policy.² On the other hand, some jurisdictions only uphold a liability by the municipality to the person conferring the benefit to the extent of the value of what has been received and appropriated, and therefore admit a recovery not upon the contract but upon quantum meruit.³

§ 62. Making Contract Valid in Substance but Invalid in Extent of Exercise of Power.

Where a contract proves invalid in part because of an

¹ *Traveler Ins. Co. v. Johnson City*, 99 Fed. 663, 49 L. R. A. 123.

² *Chapman v. Douglas County*, 107 U. S. 348, 27 L. Ed. 378; *Hitchcock v. Galveston*, 96 U. S. 341, 24 L. Ed. 659; *Drainage Commrs. v. Lewis*, 101 Ill. App. 150; *Argenti v. San Francisco*, 16 Cal. 256; *Sanitary Dist. v. Blake Mfg. Co.*, 179 Ill. 167, 53 N. E. 627; *Mound City v. Snoddy*, 53 Kan. 126, 35 Pac. 1112; *State v. Moore*, 46 Neb. 590, 65 N. W. 193; *State v. Long Branch*, 59 N. J. L. 371, 35 Atl. 1070; *Portland, etc., Co. v. East Portland*, 18 Ore. 21, 22 Pac. 536; *McGuire v. Rapid City*, 6 Dak. 346, 43 N. W. 706; *Nat. Tube Wks. v. Chamberlain*, 5 Dak. 54, 37 N. W. 761; *Bell v. Kirkland*, 102 Minn. 213, 113 N. W. 271; *Laird Norton Yds. v. Rochester*, 117 Minn. 114, 134 N. W. 644; *First Nat. Bk. v. Goodhue*, 120 Minn. 362, 139 N. W. 599; *Saleno v. Neosho*, 127 Mo. 627, 30 S. W. 190; *Moore v. New York*, 73 N. Y. 238, 29 Am. R. 134; *Portland v. Portland Bitum. Pav. & I. Co.*, 33 Ore. 307, 52 Pac. 28; *Long v. LeMoynes*, 222 Pa. St. 311, 71 Atl. 211.

³ *Schipper v. Aurora*, 121 Ind. 154, 22 N. E. 878; *Bluthenthal v. Headland*, 132 Ala. 249, 31 So. 87; *State ex rel. Morris v. Clark*, 116 Minn. 500, 134 N. W. 130; *Kramrath v. Albany*, 127 N. Y. 575, 28 N. E. 400; *Carey v. East Saginaw*, 79 Mich. 73, 44 N. W. 168; *Ellsworth v. Rossiter*, 46 Kan. 237, 26 Pac. 674; *Lincoln Land Co. v. Grant*, 57 Neb. 70, 77 N. W. 349.

attempt to grant an exclusive franchise to a public service corporation to use the city streets after the contract has been substantially performed by the corporation, after its plant had been constructed according to its terms, and after the city had accepted and used it for years, and had secured the benefits of the grant, it may not repudiate all the obligations it had the power to assume, because it assumed one that was beyond its power. The grant of such exclusive privilege is merely *ultra vires* and not immoral or illegal. There is therefore no rule of law or of morals which will relieve the recipient of the substantial benefits of a partially executed contract from the obligation to perform or to pay, because the performance of an insignificant portion of it is beyond the powers of the public body. The true rule is that when a part of a divisible contract is *ultra vires*, but neither *malum in se* nor *malum prohibitum*, the remainder may be enforced, unless it appears from a consideration of the whole contract that it would not have been made independently of the part which is void.¹

§ 63. Want of Power to Enter into Contract—Equitable Relief.

If a public contract has been entered into in good faith between a public corporation and a contractor, and the contract is partially or wholly void because of want of power to make it, or make it in the manner it was made, and the contract is not immoral, inequitable or unjust, and the contract is performed in whole or in part by one of the parties, and the other party receives the benefits of

¹ *Illinois Trust & Savings Bk. v. Arkansas City*, 76 Fed. 271; *Saginaw Gas Light Co. v. Saginaw*, 28 Fed. 529, 540; *Reagan v. Farmers L. & T. Co.*, 154 U. S. 362, 395, 38 L. Ed. 1014; *Mobile Elec. Co. v. Mobile*, 201 Ala. 607, 79 So. 39, L. R. A., 1918 F. 667.

such performance, which the contractor may lawfully give and the public body lawfully receive, the party receiving the benefits will be required to do equity towards the other party by either rescinding the contract, and placing the other party in statu quo or by accounting to the other party for all benefits received for which no equivalent has been rendered in return, and all this will be done as nearly in accordance with the terms of the contract as law and equity will permit.¹

But of course, the rule in equity can be no different than that which prevails at law where there is not a mere irregularity in letting the contract or where the contract let is not merely unauthorized but where it is let in violation of law and is utterly and jurisdictionally illegal.

§ 64. Illegal Contract—Relief in Equity—Cancellation.

Where a public body seeks relief in equity from an ultra vires contract, if the consideration received by it can be restored, a court of equity will not relieve the public body therefrom, without providing for a restoration of the consideration.²

§ 65. Illegality—Ratification—Waiver.

Where action is brought upon a contract which is illegal, no recovery may be had upon the theory that the acts have been ratified, for there can be no ratification of a contract which is illegal as distinguished from one which is merely unauthorized.³ And whether the defense of

¹ *Brown v. Atchison*, 39 Kan. 37, 17 Pac. 465, 7 Am. St. R. 515.

² *Turner v. Cruzen*, 70 Iowa, 202, 30 N. W. 483; *Moore v. New York*, 73 N. Y. 238, 29 Am. R. 134; *Argenti v. San Francisco*, 16 Cal. 256; *Lucas Co. v. Hunt*, 5 Ohio St. 488; see *Coker v. Atlanta K. & N. R. Co.*, 123 Ga. 483, 51 S. E. 481.

³ *U. S. v. Grossmayer*, 9 Wall. (U. S.) 72, 19 L. Ed. 627; *Lancaster County v. Fulton*, 128 Pa. 48, 18 Atl. 384; *Ft. Edward v. Fish*, 156 N. Y. 363, 50 N. E. 973.

illegality is pleaded or not, if the facts develop it, the court will not enforce the contract but will of its own motion take notice of its illegality, its corruption or immorality.¹ The defense of illegality may not be waived by the officers of a public body² and where the Constitution denies recovery on illegal contracts, not even the legislature may waive the illegality.³ Even contracts which are permitted by the laws of other countries are not enforceable in the courts of this country, if they contravene our laws, our morality or our policy.⁴

So a contract to bribe or corruptly influence officers of a foreign government will not be enforced in the courts of this country, not on account of regard for the interests or policy of such government but because the transaction is inherently vicious, is repugnant to our code of morality and because of the pernicious effect which its enforcement would have upon our own people.⁵

While no sort of ratification can make good an act, outside the scope of corporate authority, if a public body with full knowledge of the facts ratifies the doings of one who has assumed to act in its behalf it will be bound thereby and the ratification will make the contract as effectual as if the acts had been originally authorized by express resolution of the public body.⁶ The ratification may be by express assent or by acts or conduct inconsistent with any other supposition than that the public

¹ *Oscanyan v. Arms Co.*, 103 U. S. 261, 26 L. Ed. 539; *Nelson v. Mayor*, 131 N. Y. 4, 29 N. E. 814.

² *Northport v. Northport Townsite Co.*, 27 Wash. 543, 68 Pac. 204.

³ *Norbeck & N. Co. v. State*, 32 S. D. 189, 142 N. W. 847.

⁴ *Oscanyan v. Arms Co.*, *supra*.

⁵ *Idem*.

⁶ *Peterson v. Mayor*, 17 N. Y. 449; *Albany City Nat'l Bk. v. Albany*, 92 N. Y. 363.

body intended to adopt the act done in its behalf.¹ There must be full knowledge of all material facts in order to bind a public body by ratification.

But the rule that in order to bind a public body by ratification it must have knowledge of all material facts has no application, where its own records are in concern and it is chargeable with such knowledge, and a mere change in the individuals who constitute such body does not destroy its continuity or relieve it from the presumption of knowledge of the official acts of record performed by its predecessors.²

§ 66. Estoppel.

The doctrine of estoppel in pais applies to municipal corporations as well as to private corporations, but the public will only be estopped or not as justice and right require. Any positive acts by municipal officers which may have induced the action of the adverse party, and where it would be inequitable to permit the public body to stultify itself by retracting what its officers may have done, will work an estoppel.³ A city is accordingly estopped from recovering a penalty from a person for pursuing a lawful trade or calling for the privilege of which it has received and retains the license fee exacted of him, even though it was paid to one not a de jure officer, as long as the city retains it with knowledge of the purpose for which it was paid.⁴ A city is bound in justice and equity to repay the unearned portion of a license fee paid for the conduct of a privilege in the community where

¹ Albany City Nat. Bk. v. Albany, *supra*.

² *Idem*.

³ Martel v. E. St. Louis, 94 Ill. 67.

⁴ *Idem*.

the privilege is revoked before the term paid for has expired.¹

But courts will not compel a municipality to restore money paid for a license to carry on a business prohibited by a penal statute or against public policy, since it is a general rule that no action may be maintained to recover moneys or property lost, or damages sustained through transactions or contracts wherein the suitor is guilty of moral turpitude or which arise out of his violation of a general law—enacted to carry into effect the public policy of a State or Nation. If a municipality makes an *ultra vires* contract to authorize a business forbidden by general law and then repudiates it, no recovery of any fee paid is permissible.²

§ 67. Voluntary Payment—Recovery Back by Public Body of Money Paid Under an Illegal Contract.

If the agent of a public body pays out its money without power and authority under an illegal contract such money is recoverable back. The doctrine of voluntary payment cannot be invoked by the payee to retain the money illegally paid to him. That doctrine cannot apply to the agent of a public corporation, who pays its money out without power, to one who accepts it with full knowledge. Such action is void, and a void payment is no payment. It is not, therefore, a payment voluntarily made by the corporation, but by its agent in excess of his authority. Accordingly it is not the act of the public body but of one, who assumes to act for it, without authority. An action will therefore lie at the suit of the public body to recover back the moneys paid.³

¹ *Pearson v. Seattle*, 14 Wash. 438, 44 Pac. 884; *State v. Cornwell*, 12 Neb. 470, 11 N. W. 729.

² *Levy v. Kansas City*, 168 Fed. 524.

³ *Ft. Edward v. Fish*, 156 N. Y. 363, 50 N. E. 973; *Bd. of Supervisors v. Ellis*,

Where a contract provides that no payment shall be made for certain classes of work, if the public body makes payment therefor, it will not be considered as irrevocable or as paid under a mistake of law. Such money must be regarded as paid for work done under the contract, the only purpose for which it may lawfully be paid. If paid, it will be regarded as nothing more than an overpayment, which may properly be deducted from whatever sum was due the contractor for any portion of the work.¹ Where the public body or its officers fail to perform their duty to sue for recovery of the money, an action may be brought by a taxpayer for such purpose.

59 N. Y. 620; *Ward v. Barnum*, 10 Colo. App. 496, 52 Pac. 412; *Wayne Co. v. Reynolds*, 126 Mich. 231, 85 N. W. 574; *Bayne v. U. S.*, 93 U. S. 642, 23 L. Ed. 997; *Cayuga County v. State* (N. Y. Ct. Cl.), 183 N. Y. Supp. 646.

¹ *Chicago v. Weir*, 165 Ill. 582, 46 N. E. 725.

CHAPTER XII

EXERCISE OF PARTICULAR POWERS

§ 68. **Water and Lighting.**

It would seem that such an essential to a community as water would readily lay a foundation to imply a power to procure it from the grant of general powers such as the welfare clause common to municipal charters. But the courts have in many jurisdictions determined that the procuring of water is a matter of concern for the individual, and the community is without power to supply it except by express grant.¹ If water were used merely for drinking purposes such a conclusion might not be questioned, but even for such a purpose in the interest of the general health nothing could be so essential as a sufficient supply of wholesome and pure water. But its uses for fire and general sanitation of the streets and houses of a community make it an absolute need in our complex city civilization of to-day. In like manner, the implied power to light streets has been denied.² Lighted streets uncover the lurking highwayman and destroy the opportunity for immorality under cover of darkness in public places. These purposes relate intimately to the personal security and the moral welfare of the citizen and should afford substantial ground for the courts to infer the power to light streets from general powers granted to a community.

¹ *Wichita Water Co. v. Wichita*, 234 Fed. 415; *Huron Water Works Co. v. Huron*, 7 S. D. 9, 62 N. W. 975.

² *Posey v. North Birmingham*, 154 Ala. 511, 45 So. 663.

However, in other jurisdictions the supplying of water and the lighting of streets has been determined to be one of the fundamental grants of power which would be implied from its creation and existence and a necessary incident thereto.¹ Such power will be implied even though not expressly conferred, since the use of the power is necessary to fully protect the lives, comfort, security and property of the inhabitants.² A grant of power to provide a water supply carries with it by implication the power to contract with private persons or corporations to supply water.³ Public bodies which enter into contracts with private water companies for such a supply under express statutory authorization are not precluded from obtaining a supply from other sources. The mere fact that a public body consents to the incorporation of a company to supply water and to use its streets for that purpose and subsequently enters into a contract with such company for a supply will not constitute the franchise which the company obtains exclusive or bind the public body to obtain water exclusively from it. Such facts will not create a grant of a right to supply water exclusive in its nature,⁴ as legislative grants will not be extended by implication but on the contrary are construed strictly in favor of the public.⁵ Except so far as the privileges granted are exclusive under the terms of a grant, the power is reserved to grant and permit the exercise of competitive grants no matter how

¹ State *ex rel.* Ellis *v.* Tampa W. Wks. Co., 56 Fla. 858, 47 So. 358; Fawcett *v.* Mt. Airy, 134 N. C. 125, 45 S. E. 1029.

² Lott *v.* Waycross, 84 Ga. 681, 11 S. E. 558; Crawfordsville *v.* Braden, 130 Ind. 149, 28 N. E. 849; Opinion of Justices, 150 Mass. 592, 24 N. E. 1084; Ellinwood *v.* Reedsburg, 91 Wis. 131, 64 N. W. 885.

³ Reed *v.* Anoka, 85 Minn. 294, 88 N. W. 981.

⁴ Syracuse W. Co. *v.* Syracuse, 116 N. Y. 167, 22 N. E. 381; *Re* Brooklyn, 143 N. Y. 596, 38 N. E. 983, 26 L. R. A. 270.

⁵ *Re* Brooklyn, 143 N. Y. 596, 26 L. R. A. 270; Syracuse Water Co. *v.* Syracuse, 116 N. Y. 167, 22 N. E. 381.

injurious they may be to those taken by the earlier grantee.¹ And in determining the extent of the grant reference can only be had to the terms of the grant itself.² Where the legislature has provided that a city might condemn, if it chose to buy, the plant of a public service company such statute would conditionally protect the company during the life of the statute from municipal competition, but such statute cannot operate to enlarge the original franchise, nor grant any new franchise. It constitutes no agreement with the company and it is entirely competent for the legislature subsequently to repeal the statute and leave the city free to compete.³ In like manner, where authority was given to a town to light its streets and it made a contract with a company for five years to furnish light and the legislature repealed the act in the year following its passage, the service company could not recover from the town. Since the town had no authority to make a continuing contract, it could not bind the legislature not to repeal.⁴ Simply because a legislature passes an act which empowers municipalities to deal with public utility corporations formed under the act, is not evidence that the legislature intended to compel public bodies to deal with these corporations against their will. It is the concern of municipal authorities to light their streets by the cheapest means attainable, and they must have discretion in determining the merits and reliability of the means of reaching that result. So it may make

¹ *Syracuse W. Co. v. Syracuse*, *supra*; *Andrews v. South Haven*, 187 Mich. 294, 153 N. W. 827, L. R. A., 1916 A. 908; *Re Brooklyn*, *supra*; *Knoxville W. Co. v. Knoxville*, 200 U. S. 22, 50 L. Ed. 353; *United R. Co. v. San Francisco*, 249 U. S. 517, 63 L. Ed. 739.

² *Halstead v. New York*, 3 N. Y. 433; *Syracuse W. Co. v. Syracuse*, *supra*.

³ *Re Brooklyn*, *supra*.

⁴ *Richmond Co. G. Co. v. Middletown*, 59 N. Y. 228; *Contra*, *Cits. Water Co. v. Bridgeport Hyd. Co.*, 55 Conn. 1, 10 Atl. 170.

contracts with individuals as well as with the corporations organized.¹

Where the power is granted, the means to carry out the power is left to the discretion of the public body. It may erect its own plant or may contract for a supply.² And it may supply its inhabitants as an incident to the power granted.³ But in some jurisdictions, it has been declared that the public body may not erect a municipal plant under a grant of power to light streets.⁴ Without express power, it cannot give an exclusive franchise to a private company to furnish water or to light the streets or furnish a supply to the inhabitants.⁵ Nor may it grant a perpetual franchise,⁶ nor agree to pay annually in perpetuity to a company supplying it with water a sum equal to a certain amount on the present assessed valuation of its property.⁷ But a municipality has the power to make a contract with a water company for a water supply and provide as one of the terms of compensation that a sum equal to a portion of the taxes for each year shall be allowed in addition to payment of a definite sum for water supplied.⁸ Such a provision is not an exemption

¹ *Cits. Elec. L. Co. v. Sands*, 95 Mich. 551, 20 L. R. A. 411; *State v. Tampa W. Wks. Co.*, 56 Fla. 858, 47 So. 358.

² *Middleton v. St. Augustine*, 42 Fla. 287, 29 So. 421; *Overall v. Madisonville*, 31 Ky. L. R. 278, 102 S. W. 278; *Fawcett v. Mt. Airy*, 134 N. C. 125, 45 S. E. 1029, 63 L. R. A. 870; *Oakes Mfg. Co. v. New York*, 206 N. Y. 221, 99 N. E. 540, 42 L. R. A., n. s. 286.

³ *Crawfordsville v. Braden*, 130 Ind. 149, 28 N. E. 849; *Middleton v. St. Augustine*, *supra*; *Overall v. Madisonville*, *supra*; *Contra*, *Hyatt v. Williams*, 148 Cal. 585, 84 Pac. 41; *Christensen v. Fremont*, 45 Neb. 160, 63 N. W. 364.

⁴ *Spaulding v. Peabody*, 153 Mass. 129, 26 N. E. 421; *Howell v. Millville*, 60 N. J. L. 95, 36 Atl. 691.

⁵ *Altgelt v. San Antonio*, 81 Tex. 436, 17 S. W. 75; *Ill. Trust & Sav. Bk. v. Arkansas City*, 76 Fed. 271.

⁶ *Westminster W. Co. v. Westminster*, 98 Md. 551, 56 Atl. 990.

⁷ *Idem*.

⁸ *Utica Water Works Co. v. Utica*, 31 Hun, 426; *Maine Water Co. v. Waterville*, 93 Me. 586, 45 Atl. 830; *Ludington W. S. Co. v. Ludington*, 119 Mich. 480, 78 N. W. 558.

from taxation. Its effect is not to relieve the company from the payment of taxes, but it is to adopt the amount of taxes paid by the company as a partial measure of compensation.¹ The power to provide water carries with it the power to supply ice, as one is but the other in frozen condition.²

Municipalities have no duty to supply other municipalities or non-residents with water. It is declared that if the plant as constructed for itself affords opportunity to sell its surplus to others it has the right to do so, but cannot extend its plant outside its limits for this purpose.³ It has the right to terminate its contract at any time upon reasonable notice.⁴ Power to contract to supply water confers no power to contract to supply another city therewith.⁵ Under a power to supply water to its inhabitants there arises no implied power to contract to furnish water for fifty years at a nominal rate to induce a public institution to locate within the limits of the municipality.⁶

When a municipal corporation engages in the business of supplying water to its inhabitants it is engaged in an undertaking of a private nature.⁷ The enterprise is one

¹ *Idem*.

² *Holton v. Camilla*, 134 Ga. 560, 68 S. E. 472.

³ *Childs v. Columbia*, 87 S. C. 566, 70 S. E. 296; *Dyer v. Newport*, 123 Ky. 203, 94 S. W. 25; *Lawrence v. Methuen*, 166 Mass. 206, 44 N. E. 247; *Contra*, *Farwell v. Seattle*, 43 Wash. 141, 86 Pac. 217.

⁴ *Childs v. Columbia*, *supra*.

⁵ *Rehill v. Jersey City*, 71 N. J. L. 109, 58 Atl. 175.

⁶ *Eastern Ill. St. Normal School v. Charleston*, 271 Ill. 602, 111 N. E. 573.

⁷ *Piper v. Madison*, 140 Wis. 311, 122 N. W. 730, 25 L. R. A. n. s. 239, 133 Am. St. Rep. 1078; *People ex rel. Park Comrs. v. Detroit*, 28 Mich. 229, 15 Am. Rep. 202; *Aldrich v. Tripp*, 11 R. I. 141, 23 Am. Rep. 434; *Judson v. Winsted*, 80 Conn. 384, 68 Atl. 999, 15 L. R. A. n. s. 91; *Wagner v. Rock Island*, 146 Ill. 139, 34 N. E. 545, 21 L. R. A. 519; *Esberg Cigar Co. v. Portland*, 34 Or. 282, 55 Pac. 961, 43 L. R. A. 435, 75 Am. St. Rep. 651; *Brown v. Salt Lake City*, 33 Utah, 222, 93 Pac. 570, 14 L. R. A. n. s. 619, 126 Am. St. Rep. 828, 14 Ann. Cas. 1004; *Hourigan v. Norwich*, 77 Conn. 358, 59 Atl. 487, 17 Am. Neg. Rep. 445; *Lynch v. Springfield*, 174 Mass. 430, 54 N. E. 871; *Philadelphia v. Gilmartin*, 71 Pa. St. 140; *Asher v. Hutchinson Water*

which involves the ordinary incidents of a business wherein something is sold which people desire to buy and which may become profitable. Under these circumstances a municipality becomes liable for the breach of its contract or for negligence just as a proprietor of a private business might become.¹ There is no implied warranty that water is wholesome.² A municipality, however, acts in a governmental capacity and discharges a governmental function when it furnishes water to its own Fire Department, and when so acting in a governmental capacity, of course is not liable.³ In the absence of an express agreement to pay for water an implied contract will arise, where a consumer actually uses the water.⁴

§ 69. Contracts Relating to Sanitation.

While the powers of political subdivisions to contract cannot be extended by intendment or implication beyond the terms of the express grant of powers or those which are a necessary incident to carry out the express powers, there is nevertheless included as incidental to their ordinary powers, the power of self-preservation, and the means to carry out the essential purposes and objects of their existence.

One of the powers necessary to preserve society and to properly exercise the functions of local government is the

Light & P. Co., 66 Kan. 496, 71 Pac. 813, 61 L. R. A. 52; *Keever v. Mankato*, 113 Minn. 55, 129 N. W. 158, 775, 33 L. R. A. n. s. 339, Ann. Cas. 1912 A. 216; *Oakes Mfg. Co. v. New York*, 206 N. Y. 221 99 N. E. 540, 42 L. R. A. n. s. 286.

¹ *Oakes Mfg. Co. v. New York*, *supra*; *Stock v. Boston*, 149 Mass. 410, 21 N. E. 871; *Watson v. Needham*, 161 Mass. 404, 37 N. E. 204, 24 L. R. A. 287; *Milnes v. Huddersfield*, L. R. 13, 2 B. D. 443; *Lynch v. Springfield*, 174 Mass. 430, 54 N. E. 871.

² *Canavan v. Mechanicsville*, 229 N. Y. 473, 128 N. E. 882.

³ *Springfield F. & M. Co. v. Keeseville*, 148 N. Y. 48, 42 N. E. 405.

⁴ *Woodward v. Livermore Falls Water Dist.*, 100 Atl. (Me.) 317.

power to enact sanitative regulations for the preservation of the health and the lives of its inhabitants,¹ and to make necessary contracts to fulfill such a purpose;² and exclusive contracts granting a monopoly to the contractor for the removal of offensive products, objects and things dangerous to the health of the community have been sustained as entirely valid.³ The reason for the rule is to be found in this that the removal of noxious and unwholesome matter tends directly to promote the public health, comfort and welfare and is, therefore, a proper exercise of the police power; and the privileges granted although exclusive are therefore an incident to the proper exercise of the police power of the State.⁴ The legislative power cannot, however, under the guise of police regulations arbitrarily invade personal rights and private property unless these have in fact some relation to the public health or public welfare and such is the end sought to be attained thereby.⁵ General power under a charter to make regulations for the promotion of health and the suppression of disease will not confer upon a municipality power to give an exclusive privilege to one contractor who will pay for it with the effect of destroying the legitimate business of many others.⁶ And under the guise of such regulations the public body may not deprive the owners of their property.⁷

¹ *St. Paul v. Laidler*, 2 Minn. 190.

² *Smiley v. McDonald*, 42 Neb. 5, 60 N. W. 355; *Alpers v. San Francisco*, 32 Fed. 503; *Walker v. Jameson*, 140 Ind. 591, 37 N. E. 402, 39 N. E. 869.

³ *Rochester v. Gutberlett*, 211 N. Y. 309, 105 N. E. 548; *Smiley v. McDonald*, 42 Neb. 5, 60 N. W. 355; *Alpers v. San Francisco*, 32 Fed. 503; *National Fertilizer Co. v. Lambert*, 48 Fed. 458; *State v. Orr*, 68 Conn. 101, 35 Atl. 770; *Tiede v. Schneidt*, 105 Wis. 470, 81 N. W. 826.

⁴ *Smiley v. McDonald*, *supra*.

⁵ *Smiley v. McDonald*, *supra*; *Landberg v. Chicago*, 237 Ill. 112, 86 N. E. 638.

⁶ *Landberg v. Chicago*, 237 Ill. 112, 86 N. E. 638.

⁷ *River Rendering Co. v. Behr*, 77 Mo. 91.

§ 70. Exclusive Privileges—Monopoly.

Municipal corporations having the power express or implied to contract with others to furnish its inhabitants with ferry, railway, telephone, water, gas, electricity or other public service or utility may grant franchises, and when the privilege thus granted is accepted and the grantee enters upon its right to use the streets, a contract is created which is valid and enforceable, and which may not be revoked or rescinded except for cause.¹

But these political subdivisions of the State have no power to grant exclusive privileges or franchises to deal in such commodities unless the power to do so is clearly and unmistakably conferred by the legislature, by express grant or necessary implication therefrom,² and, indeed, in some States there prevail constitutional limitations in regard to the granting of exclusive privileges, perpetuities and monopolies which deny such power even to the legislatures.³ In the absence of such constitutional restrictions the power to grant exclusive privileges or franchises may be conferred by the legislature upon municipalities.⁴ In construing charter and statutes conferring upon municipalities the right to provide for these public conveniences and utilities the authority to grant exclusive privileges

¹ *People ex rel. Pontiac v. Cent. Union Tel. Co.*, 192 Ill. 307, 61 N. E. 428; *Baxter Springs v. Baxter Springs L. & P. Co.*, 64 Kan. 591, 68 Pac. 63; *Peo. v. O'Brien*, 111 N. Y. 1, 18 N. E. 692.

² *Syracuse Water Co. v. Syracuse*, 116 N. Y. 167, 22 N. E. 381; *Altgelt v. San Antonio*, 81 Tex. 436, 17 S. W. 75; *Detroit Cits. St. Ry. v. Detroit Railway*, 171 U. S. 48, 43 L. Ed. 67, aff'g 110 Mich. 384, 35 L. R. A. 859; *Minturn v. Larue*, 64 U. S. 435, 16 L. Ed. 574.

³ *Thrift v. Bd. of Commrs. of Elizabeth City*, 122 N. C. 31, 30 S. E. 349; *Atlantic City W. Wks. Co. v. Consumers Water Co.*, 44 N. J. Eq. 427, 15 Atl. 581.

⁴ *Freeport Water Co. v. Freeport City*, 180 U. S. 587, 45 L. Ed. 679, aff'g 186 Ill. 179, 57 N. E. 862; *Danville W. Co. v. Danville*, 180 U. S. 619, 45 L. Ed. 696, aff'g 186 Ill. 326, 57 N. E. 1129; *Milwaukee Elec. Ry. & L. Co. v. Railroad Commrs.*, 238 U. S. 174; *Logan v. Pyne*, 43 Iowa, 524.

will not be implied from the use of general language,¹ and these grants will be strictly construed and any ambiguity or doubt resolved in favor of the public and against the grantee.² Municipalities can bind themselves by contract only as they are empowered by statute or charter so to do. They may not accordingly grant exclusive privileges to put in mains, pipes, hydrants and wires for water, light or telephone supply and service. Where it cannot well be claimed that express power to grant exclusive franchises was delegated to them, public policy will not permit the inference of authority to make a contract inconsistent with its legislative duty which is continuously operative to make such regulations from time to time as the public interest may require.³

While public bodies may make contracts for legitimate public purposes and become liable for failure to observe them, it is not consistent with the discretionary or legislative powers vested in them and effected through their general governing body in the discharge of duty, for them by contract to grant exclusive privileges having the character of perpetuity.⁴ Franchises for a term of years may come within the condemnation of monopoly as well as those of indefinite or perpetual duration.⁵ The powers of municipal corporations are limited to the express terms of the grant, and will not be extended by inference. They

¹ *Detroit Cits. St. Ry. Co. v. Detroit*, 110 Mich. 384, 68 N. W. 304, 171 U. S. 48; *Long v. Duluth*, 49 Minn. 280, 51 N. W. 915; *Logan v. Pyne*, *supra*; *Saginaw G. L. Co. v. Saginaw*, 28 Fed. 529.

² *Saginaw G. L. Co. v. Saginaw*, *supra*; *Syracuse W. Co. v. Syracuse*, 116 N. Y. 167, 22 N. E. 381.

³ *Syracuse W. Co. v. Syracuse*, *supra*; *Gale v. Kalamazoo*, 23 Mich. 344; *Logan v. Pyne*, *supra*; *Des Moines G. Co. v. Des Moines*, 47 Iowa, 505; *Norwich G. L. Co. v. Norwich G. Co.*, 25 Conn. 19.

⁴ *Syracuse Water Co. v. Syracuse*, *supra*; *Westminster W. Co. v. Westminster*, 98 Md. 551, 56 Atl. 990.

⁵ *Columbus Water Co. v. Mayor of Columbus*, 48 Kan. 99, 28 Pac. 1097.

cannot confer exclusive privileges for the prosecution of business except under express grant of authority from the legislature. Since monopolies are prejudicial to the public welfare, grants thereof will not be inferred, for to do so would presume a legislative intent in conflict with public policy.¹ Accordingly, an ordinance which granted the exclusive franchise for five years of running omnibuses in the city of Dubuque was held invalid in so far as it attempted to prevent competitors of the grantee in the ordinance from carrying on the same business.²

Under similar reasoning where a party has been given the right by contract with a city to build and control a market house for the period of ten years, the contract was declared void because it created a monopoly which the city had no authority to grant.³ And the right to do all slaughtering of animals in a city for a specified period was void for the same reason.⁴

Monopolies are more readily sustained in matters relating to the abatement of nuisances, sanitative matters and matters relating to the public health and in these regards monopolies have been sustained for the removal of garbage dead animals, offal and other deleterious, offensive and unwholesome substances.⁵ A covenant by a city not to grant to any other person or corporation a privilege or exclusive franchise similar to that granted to the covenantee does not restrict the city from itself exercising similar power, and this principle applies to legislative grant. A grantee takes the risk of judicial interpretation

¹ *Logan v. Pyne*, *supra*.

² *Idem*.

³ *Gale v. Kalamazoo*, 23 Mich. 344, 9 Am. R. 80.

⁴ *Chicago v. Rumpff*, 45 Ill. 90.

⁵ *Smiley v. McDonald*, 42 Neb. 5, 60 N. W. 355; *Rochester v. Gutberlett*, 211 N. Y. 309. (Cases preceding section.)

of its franchise and of the possible competition by a city of operating railroads of its own.¹

§ 71. Granting Franchise to Use Streets.

A municipality has only power to grant franchises for the use of the public streets so far as this power has been delegated to it by the legislature. Primarily this power to grant franchises resides in the State. But where it has been conferred, municipalities may grant to individuals and not merely to corporations, a franchise for the construction and operation of street surface railroads, and a municipality has power to require a bond conditioned for the construction of the road, as a bond given to secure performance of a duty which is coupled with a right granted is valid.²

But a municipality may not grant to a private business corporation, the license or right to maintain spurs or tracks in its streets for the private purpose of conveying goods from a store to a street railroad. The charter powers of the municipality which authorize it to make contracts for the occupation of its streets will not confer power to make contracts for the use of streets by private individuals.³ And such a spur or siding may not be maintained even by a railroad corporation to connect a private freight station with its main tracks where the maintenance and use of it does not bear a relation so direct and necessary to the fulfillment of the functions of the railroad corporation as to bring it by fair implication within the scope of the grant, and the department of highways may not by permit enlarge the powers of the railroad company and allow the

¹ *Knoxville Water Co. v. Knoxville*, 200 U. S. 22, 50 L. Ed. 353; *United Railroads v. San Francisco*, 249 U. S. 517, 63 L. Ed. 739, 239 Fed. 987.

² *Phoenix v. Gannon*, 195 N. Y. 471, 88 N. E. 1066.

³ *Hatfield v. Straus*, 189 N. Y. 208, 82 N. E. 172.

maintenance of the spur. Furthermore, were such an exercise of power lawful in its origin, it would be a mere revocable privilege.¹ Conducting private business and using private easements in public streets, even where expressly authorized, will be condemned by the courts.² The municipality may not authorize permanent encroachments of the walls of the buildings upon its public streets. It holds the title to its streets impressed with the trust to keep the same open for the public use by the whole people, and it has no power to use them or permit them to be used other than as the legislature may authorize for some public use or benefit. It, therefore, cannot divert them by contract to private uses.³ And an ordinance which attempts to legalize the projection of a building into a public street, withdrawing a portion of it from public use, is unconstitutional and void.⁴

When the power to grant a franchise for the use of its streets by a railroad is granted, the municipality may require as a condition of obtaining the consent of the municipality to permit the construction and maintenance of the railroad that the railroad company shall pave the street, change the grade of the street, or that it shall erect a depot at a specified place. These are lawful and proper conditions. It may also require at any time when the public interest demands it that such company shall discontinue the use of the street and shall remove its tracks

¹ Brooklyn Heights R. R. Co. v. Steers, 213 N. Y. 76, 106 N. E. 919; Lincoln Safe Dep. Co. v. New York, 210 N. Y. 34, 103 N. E. 768. See Denver & R. G. R. Co. v. Denver, 250 U. S. 241, 63 L. Ed. 958.

² Fifth Ave. Coach Co. v. New York, 194 N. Y. 19, 86 N. E. 824, 21 L. R. A. N. S. 744, aff'd 221 U. S. 467, 55 L. Ed. 815; State ex rel. Belt v. St. Louis, 161 Mo. 371, 61 S. W. 658; People ex rel. Healy v. Clean Street Company, 225 Ill. 470, 80 N. E. 298.

³ New York v. Rice, 198 N. Y. 124, 91 N. E. 283.

⁴ McMillan v. Klaw & Erlanger, 107 N. Y. App. Div. 407; Ackerman v. True, 175 N. Y. 355, 67 N. E. 629.

therefrom. And the municipality where it thus expressly reserves the right to revoke the franchise, may revoke the same at its pleasure even though the railroad has gone to large expense and has complied with all the other conditions imposed. It is simply a matter of complying with the terms of its engagement.¹ But a railroad may gain such an exclusive use of a street that a municipality may not thereafter interfere with its structures or require their relocation.²

Where a city grants the right to use that part of its streets under the sidewalks for vault purposes, even though it imposes a fee therefor, such right is not a contract but a mere revocable license which may be revoked at any time that the city sees fit to use the space for any other purpose,³ which may not necessarily be a street purpose, but may be even a private purpose.⁴

§ 72. Power to Arbitrate.

Municipalities usually possess the power to sue and to be sued either expressly granted or derived necessarily from the power to contract. The power to arbitrate springs as an incidental or implied power from both of these other powers, and unless restricted by statute such public body may without express authority submit claims in its favor or against it to arbitration.⁵ They have the same power to liquidate claims and indebtedness which natural persons have and from that source proceeds power to adjust old dis-

¹ Del. L. & W. R. Co. v. Oswego, 92 N. Y. App. Div. 551.

² New York v. Hudson & M. R. Co., 229 N. Y. 141, 128 N. E. 152.

³ Deshong v. New York, 176 N. Y. 475, 68 N. E. 880.

⁴ Lincoln Safe Dep. Co. v. New York, 210 N. Y. 34, 103 N. E. 768. See Matter of Rapid Trans. Commrs., 197 N. Y. 81, 90 N. E. 456.

⁵ Buckland v. Conway, 16 Mass. 396; Dix v. Dummerston, 19 Vt. 262; Shawneetown v. Baker, 85 Ill. 563, 25 Am. R. 321; Hartuppee v. Pittsburgh, 131 Pa. 535, 19 Atl. 507; Walnut v. Rankin, 70 Iowa, 65, 29 N. W. 806; Kane v. Fond du Lac, 40 Wis. 495; Brady v. Brooklyn, 1 Barb. 584.

puted claims and, when the amount is ascertained, to pay it, as other indebtedness. By the same reasoning, they may submit to arbitration all unsettled claims with the same liability to perform the award as would rest upon a natural person.¹ But while this power is not denied to municipalities, if a special mode is provided to exercise a particular power, as for instance, the power of eminent domain, this impliedly disables the public body from submitting such a cause to arbitration.² The power of submission rests with the general governing body of the municipality,³ although it is declared that its attorney may consent to a reference for it.⁴ Since a submission is a contract, if the power of a municipality is limited to contracting in writing, and it is prohibited from paying any claim not specifically appropriated for, this negatives the existence of a common-law power to submit to arbitration.⁵

§ 73. Compromise of Disputed Claims.

The power to sue or be sued, which municipalities possess, carries with it the implied power to settle or compromise claims which are in dispute. These public bodies have no power to give away their funds or appropriate them to unwarranted purposes. As they cannot directly dispose of them by way of gratuity, they cannot accomplish such a result by indirection.⁶ They have the power to compromise and settle a claim in their favor or against them if

¹ *Shawneetown v. Baker*, *supra*.

² *Paret v. Bayonne*, 39 N. J. L. 559, 40 N. J. L. 33.

³ *Shawneetown v. Baker*, *supra*; *Griswold v. N. Stonington*, 5 Conn. 367.

⁴ *Paret v. Bayonne*, *supra*.

⁵ *Dist. of Columbia v. Bailey*, 171 U. S. 161, 43 L. Ed. 118.

⁶ *Bd. of Supervisors Orleans County v. Bowen*, 4 Lans. 124; *Petersburg v. Mappin*, 14 Ill. 193, 56 Am. D. 501; *Agnew v. Brall*, 124 Ill. 312, 16 N. E. 230; *Ludlow Valve Mfg. Co. v. Chicago*, 181 Ill. App. 388; *Gordon v. State*, 233 N. Y. 1.

there is a bona fide dispute about the claim or its amount, and they may accept in settlement a sum less than the full amount.¹ A settlement of an existing controversy if made in good faith is binding, but is not if collusively made.² But where a claim has been reduced to judgment, they have no power to compromise the judgment,³ unless the adverse party has appealed⁴ or is about to appeal from the judgment or his time to appeal has not run.⁵ But the doctrine above stated that they possess no power to compromise a claim which is reduced to judgment no longer applies after a municipality has exhausted its legal remedies to collect it. They may then pursue the methods which ordinary prudence dictates in the management of business by private persons, for these apply to municipalities, and may make a settlement.⁶

When the power to audit and settle has been expressly conferred by law upon the chief financial officer of the municipality no power any longer exists in its law officer to settle and adjust or compromise claims, even though they are involved in pending litigation where he has appeared.⁷

Even where power exists to compromise claims, a municipality may not confess judgment upon a liability which it would have no power to incur by direct contract. Such cannot be indirectly made valid by a consent to judgment,

¹ Petersburg v. Mappin, *supra*; Agnew v. Brall, 124 Ill. 312, 16 N. E. 230; Orleans County v. Bowen, *supra*; Hall v. Baker, 74 Wis. 118, 42 N. W. 104; People v. San Francisco, 27 Cal. 655; Bailey v. Philadelphia, 167 Pa. 569, 31 Atl. 925.

² Petersburg v. Mappin, *supra*.

³ Farnsworth v. Wilbur, 49 Wash. 416, 95 Pac. 642.

⁴ Orleans County v. Bowen, 4 Lans. 124.

⁵ Agnew v. Brall, *supra*; Petersburg v. Mappin, *supra*; State v. Davis, 11 S. D. 111, 75 N. W. 897.

⁶ Washburn County v. Thompson, 99 Wis. 585, 75 N. W. 309.

⁷ Bush v. O'Brien, 164 N. Y. 205, 58 N. E. 106.

where the consent related to a railroad subscription which the town authorities had no power to make.¹ Consent judgments are in effect contracts recorded in open court, and such a contract cannot bind a party to it which had no power to make a subscription or give a donation to a railroad any more than its contracts not of record could bind it for such a purpose.²

§ 74. Contract with Attorney.

Municipalities have the implied power to employ counsel. This power is possessed by every public body which has the power to sue and be sued.³ It needs not much argument to see that this is necessarily so, for if it could be sued and still could not employ an attorney, it would be at the mercy of litigants against it, deprived of power to defend itself.

Where, however, the charter or statutes provide for a city attorney or counsel to the corporation whose duties are to prosecute and defend suits and to take care of the law business of the public body, these express provisions exclude the power to employ any other attorney.⁴ When it becomes necessary for the protection of the interests of a municipality to employ additional counsel, such may be employed,⁵ to assist but not to supersede the city attorney.⁶ Where one who was legal adviser for the municipality continues to conduct the lawsuit without objection

¹ *Union Bk. of Richmond v. Commrs. of Oxford*, 119 N. C. 214, 25 S. E. 966.

² *Idem.*

³ *Farrel v. Derby*, 58 Conn. 234, 20 Atl. 460; *Memphis v. Adams*, 9 Heisk. (Tenn.) 518.

⁴ *Lyddy v. Long Island City*, 104 N. Y. 218, 10 N. E. 155; *Hope v. Alton*, 214 Ill. 102, 73 N. E. 406; *Merriam v. Barnum*, 116 Cal. 619, 48 Pac. 727.

⁵ *Boise City v. Randall*, 8 Idaho, 119, 66 Pac. 938; *Moorehead v. Murphy*, 94 Minn. 123, 102 N. W. 219; *Vicksburg W. Co. v. Vicksburg*, 99 Miss. 132, 54 So. 852.

⁶ *Clough v. Hart*, 8 Kan. 487; *State, Hoxsey v. Paterson*, 40 N. J. L. 186.

after his official term has expired, he may recover for his services upon an implied obligation.¹ This power of a municipality to employ counsel extends to the defense of one of its police officers who is sued for false imprisonment.² But because it empowers its attorney to appear and defend an action wherein the officer is charged with a tort will not make the city liable for the tort.³ Not being liable for these acts of its police officers, it is not the duty of the municipality to defend them, and while it may, this will not authorize the city attorney to agree to pay a stenographer for performing services in an action to which the city is not a party.⁴ The governor of a State has no implied power to employ counsel at the expense of the State,⁵ and where authorized to make a contract with an attorney, he may not exceed the authority conferred.⁶ The mayor has no implied power to employ attorneys although in case of an emergency such power will be implied to protect the city.⁷

But where the mayor finds himself forced into court with the official law officer arrayed against him to compel him to take a course of official action which he deemed violative of law and detrimental to the interests of the city and he is thereby compelled to engage counsel to defend him, while no authority will be implied in him to employ counsel, he will be compensated under the general principle of law that where an officer is required by law to

¹ *Langdon v. Castleton*, 30 Vt. 285.

² *Cullen v. Carthage*, 103 Ind. 196, 2 N. E. 571.

³ *Buttrick v. Lowell*, 83 Mass. (1 Allen) 172.

⁴ *Chicago v. Williams*, 182 Ill. 135, 55 N. E. 123.

⁵ *Cahill v. Bd. of State Auditors*, 127 Mich. 487, 86 N. W. 950; *People ex rel. Spencer v. Knight*, 116 Cal. 108, 47 Pac. 925.

⁶ *Julian v. State*, 122 Ind. 68, 23 N. E. 690, 140 Ind. 581, 39 N. E. 923.

⁷ *Louisville v. Murphy*, 86 Ky. 53, 5 S. W. 194; see *Barnert v. Paterson*, 48 N. J. L. 395, 6 Atl. 15.

perform a duty involving the disbursement of money out of pocket, he is entitled to be reimbursed.¹

Under some circumstances, where benefits are received and employment by the mayor is acquiesced in, there will arise an implied obligation to pay.² Where the legislature authorizes the employment of an attorney to prosecute a claim of the State requiring the procuring of legislation upon an agreement to compensate him only in event of success, and the State is bound, when the payment of the claims is obtained, to hold the funds for the benefit of the persons for whom they were collected and cannot pay part of them as a fee, it is liable to pay the moral obligation which it owes out of its own funds.³

§ 75. To Acquire and Hold Property.

Municipalities may take by purchase and hold real estate, by the immemorial usage of the country creating such right as an incident to their corporate powers. In colonial days they possessed the power upon a majority vote to make grants of the same for purposes of settlement. And in these days, the same right is exercised and much land comes into their possession which is not essential for their corporate needs, such as the erection of public buildings and the like.⁴ While the inhabitants of municipalities may not be taxed to raise money for the purchase of lands to be used for a purpose not corporate,⁵ these public bodies may under implied powers take real or personal property by gift or devise even though not

¹ *Barnert v. Paterson*, 48 N. J. L. 395, 6 Atl. 15.

² *Mound City v. Snoddy*, 53 Kan. 126, 35 Pac. 1112.

³ *Davis v. Comm.*, 164 Mass. 241, 41 N. E. 292.

⁴ *Worcester v. Eaton*, 13 Mass. 371, 9 Am. Dec. 155; *Christy v. St. Louis*, 20 Mo. 143, 61 Am. D. 598.

⁵ *Markley v. Mineral City*, 58 Ohio St. 430, 51 N. E. 28; *Worcester v. Eaton*, *supra*.

intended to be used for a corporate purpose.¹ They may accordingly own, control and manage farms, buildings or other property, operating them as individuals do for their own emolument, profit and advantage, and entirely disconnected from any public use.² They may in like manner take a voluntary grant of an easement for street purposes.³ But they possess no power to acquire real estate for the purpose of donating same to third persons to induce them to construct and operate manufacturing plants within their corporate limits.⁴ If in the course of acquiring property they exceed their corporate powers, the grantors may not avail themselves of this fact; the only authority who may question the misuser of powers is the State and even the courts may not in a collateral way declare void conveyances made to them in good faith.⁵

§ 76. To Sell Property.

The real or personal property of a private nature which belongs to a municipality may be alienated or sold by it under powers which will be implied from its general powers.⁶ But these public bodies have no power to sell or dispose of property of a public nature in violation of the trusts or uses upon which it is held unless relieved of the trusts and authorized to sell by the legislature.⁷ The

¹ *Worcester v. Eaton*, *supra*; *Oliver v. Worcester*, 102 Mass. 489, 3 Am. R. 485; *Libby v. Portland*, 105 Me. 370, 74 Atl. 805; *Hathaway v. Milwaukee*, 132 Wis. 249, 111 N. W. 570.

² *Libby v. Portland*, 105 Me. 370, 74 Atl. 805.

³ *Hathaway v. Milwaukee*, 132 Wis. 249, 111 N. W. 570.

⁴ *Markley v. Mineral City*, *supra*.

⁵ *Raley v. Umatilla*, 15 Oreg. 172, 13 Pac. 890.

⁶ *Ft. Wayne v. Lake Shore & M. S. R. Co.*, 132 Ind. 558, 32 N. E. 215; *Beach v. Haynes*, 12 Vt. 15; *Jamison v. Fopiana*, 43 Mo. 565, 97 Am. D. 414; *Newbold v. Glenn*, 67 Md. 489, 10 Atl. 242; *Warren County v. Patterson*, 56 Ill. 111; *Reynolds v. Stark County Commrs.*, 5 Ohio St. 204.

⁷ *Brooklyn Park Commrs. v. Armstrong*, 45 N. Y. 234; *Douglas v. Montgomery*, 118 Ala. 599, 24 So. 745; *Alton v. Illinois T. Co.*, 12 Ill. 38, 52 Am. D.

authorities, however, establish a distinction between property which is purchased for a public purpose and actually dedicated to that use and property so purchased but not actually dedicated to the public purpose. In the former case, there is no implied power to alienate or dispose of it,¹ while in the latter case such power will be implied,² unless restrained by charter or statute. Even where it is expressed in the deed of conveyance of the land purchased that it is for a public common, until it is devoted actually to such a purpose, it may be alienated.³ But when so devoted, it may not be alienated or disposed of.⁴ Public buildings, parks, squares, wharves, landing places, waterworks, fire apparatus and fire houses and like properties of a municipality are generally regarded as held for a public purpose and may not be sold without statutory sanction.⁵ In those instances, where a power of sale is conferred, it will not permit the municipality to indulge in barter or exchange.⁶ Where a privilege or easement is conferred by a municipality to use its property for vault purposes under a city sidewalk, the privilege or easement may be recalled by it when it needs the land for any purpose, and the right of recall is not to be limited to cases where the land is necessary for street purposes but it may be taken back for its proprietary or business purposes, since the very object of acquiring title in fee as

479; *Lake County W. Co. v. Walsh*, 160 Ind. 32, 65 N. E. 530; *Cook v. Burlington*, 30 Iowa, 94, 6 Am. R. 649; *Rose v. Baltimore*, 51 Md. 256, 34 Am. R. 307; *Palmer v. Albuquerque*, 19 N. M. 285, 142 Pac. 929, L. R. A. 1915 A. 1106.

¹ *State v. Woodward*, 23 Vt. 92; *Ft. Wayne v. Lake Shore & M. S. R. Co.*, *supra*.

² *Ft. Wayne v. Lake Shore & M. S. R. Co.*, *supra*; *Beach v. Haynes*, *supra*.

³ *Idem*.

⁴ *State v. Woodward*, *supra*; *Ft. Wayne v. Lake Shore & M. S. R. Co.*, *supra*.

⁵ *Huron Waterworks Co. v. Huron*, 7 S. D. 9, 62 N. W. 975; *Meriwether v. Garrett*, 102 U. S. 472, 26 L. Ed. 197; *New Orleans v. Morris*, 105 U. S. 600, 26 L. Ed. 1184.

⁶ *Cleveland v. State Bank*, 16 Ohio St. 236.

distinguished from an easement is to vest in the public the right to use the land for all purposes.¹

Wharves and piers which are the continuations of public streets held by the municipality in trust for the public use may not be alienated as the municipality has no power to convey title in contravention of the trust unless authorized to do so by legislative sanction. But a city has power to dedicate its own lands to street uses and may bind itself by covenant with the grantees of abutting property that the lands so dedicated shall be kept open forever as a public street.²

A municipality under these principles may lease for the erection of summer cottages its common lands, which it had power by appropriate vote to divide amongst its inhabitants, as long as they are not needed for public purposes.³

§ 77. To Borrow Money and Incur Indebtedness.

Since municipalities can only exercise those powers which have been expressly granted to them by statute or such as are necessarily and fairly implied from those conferred or are essential to the declared objects and purposes for which they were created and ordained, the people and their property can only be bound in accordance with those powers. It does not belong to local governments as a mere matter of course to raise loans. It is not a power incident to their creation. When they incur debts, the appropriate method of paying for them is in cash or its equivalent obtained through the power of taxation.⁴ In

¹ *Lincoln Safe Dep. Co. v. New York*, 210 N. Y. 34, 103 N. E. 768.

² *Knickerbocker Ice Co. v. Forty-Second St. & G. S. F. Co.*, 85 N. Y. App. Div. 530, 176 N. Y. 408, 68 N. E. 864; *People ex rel. N. Y. Cent., etc., R. Co. v. Priest*, 206 N. Y. 274, 99 N. E. 547.

³ *Davis v. Rockport*, 213 Mass. 279, 100 N. E. 612.

⁴ *Nashville v. Ray*, 86 U. S. 468, 22 L. Ed. 164; *Wells v. Salina*, 119 N. Y. 280, 23 N. E. 870; *Hackettstown v. Swackhamer*, 37 N. J. L. 191.

order to exercise a different means of payment, such as borrowing money through an issue of bonds, municipalities must be in possession of the power to do so by express grant or it must be clearly implied from legislative enactment.¹ Accordingly, it is generally and uniformly declared that the power to borrow money is not to be implied as an incident to general powers, but on the contrary its existence will not be inferred from general language but will be denied.² Its negation rests in addition upon grounds of public policy as a safeguard against heavy and ruinous debt which might be incurred by improvident, careless or faithless officials. Were the rule otherwise, money could be borrowed for one purpose and spent for another, to the utter ruin of municipalities.³

There is, however, a well-recognized distinction between the power to borrow money to pay a contract debt and the power to contract the debt on credit. In the latter case, the use of credit promotes the accomplishment of the authorized object, and payment is made by taxation. This power to use credit is generally recognized.⁴ Where the power to borrow money is not derived from express grant but is incidental to general powers of government it exists with the limitation upon it that money may only be borrowed to carry out express powers and for purposes for which it may legitimately be raised by taxation.⁵

¹ *Allen v. Intendant & C. of Lafayette*, 89 Ala. 641, 8 So. 30; *Nashville v. Ray*, *supra*; *Wells v. Salina*, *supra*; *Hackettstown v. Swackhamer*, *supra*; *Hanger v. Des Moines*, 52 Iowa, 193, 2 N. W. 1105; *Lemon v. Newton*, 134 Mass. 476.

² *Wells v. Salina*, *supra*.

³ *Ketchum v. Buffalo*, 14 N. Y. 356.

⁴ *Ketchum v. Buffalo*, *supra*; *Galena v. Corwith*, 48 Ill. 423.

⁵ *Merrill v. Monticello*, 138 U. S. 673, 34 L. Ed. 1069; *Chillicothe Bk. v. Chillicothe*, 7 Ohio, 31, 30 Am. D. 185.

§ 78. To Assume Responsibilities which the Law Places on Others.

Municipalities have no power to assume obligations or responsibilities which the law casts upon others.¹ They have no power to aid a railroad corporation in the performance of the duties and responsibilities which the maintenance of its road imposes. Such an attempt by way of a contract to do so is not only *ultra vires* but is without consideration to support it.² Contracts by which municipalities undertake to assume obligations and duties properly resting on others to restore a street,³ to build a bridge,⁴ or to maintain a bridge⁵ are wholly beyond their powers, and void. And it may not make a contract to bear part of the expense of building a bridge or repairing it.⁶ Even a State may not assume an obligation which belongs to the Nation, when limited by its own Constitution.⁷

§ 79. Expending Money for Purposes not Public and Making Contracts to Carry Out Such Objects.

The National and State governments, except as restricted and limited by their Constitutions, have unlimited power to determine what is for the public good and what are public uses and purposes for which public money may be expended. These are matters confided to the keeping

¹ *Snow v. Deerfield Tp.*, 78 Pa. St. 181; *Minneapolis R. Co. v. Minneapolis*, 124 Minn. 351, 145 N. W. 609.

² *Snow v. Deerfield Tp.*, *supra*; *Newton v. C. R. I. & Pac. Ry. Co.*, 66 Iowa, 422, 23 N. W. 905.

³ *Snow v. Deerfield Tp.*, *supra*.

⁴ *State v. St. Paul M. & M. Ry. Co.*, 98 Minn. 380, 108 N. W. 261.

⁵ *State ex rel. St. Paul v. Minnesota Trans. Ry. Co.*, 80 Minn. 108, 83 N. W. 32.

⁶ *Minneapolis, St. P. R. & D. E. T. Co. v. Minneapolis*, 124 Minn. 351, 145 N. W. 609.

⁷ *People v. Westchester Co. Nat. Bank*, 231 N. Y. 465, 132 N. E. 241.

of the Congress and the legislatures and cannot be controlled by the courts by judicial revision. Whenever accordingly contracts are made by these National and State departments of government or by agents and officers of the Nation or State thereunto duly authorized, pursuant to appropriate legislation, the courts have no power to determine that the purpose is not public, except in case of constitutional restraint, that power being vested solely as indicated. Contracts made, therefore, and liabilities incurred by a World's Fair Commission appointed under State authority are valid and enforceable even though a private corporation in charge of such World's Fair might profit by it, since the statute was not passed to confer such incidental benefit but to promote the public good.¹ But where municipalities or other similar public bodies undertake such expenditures they must find warrant for so doing in express grant of authority and it will not be implied, from the general powers possessed by such bodies. Unless so authorized they have no right or authority to expend money or contract a liability to pay it for a purpose which was not clearly public. Accordingly these various political subdivisions of the State have no power to appropriate money and make contracts involving their expenditure to celebrate important events in the history of the country such as the anniversary of the Declaration of Independence,² nor to celebrate the anniversary of the surrender of Cornwallis.³ They may not make valid contracts for the celebration of such an occa-

¹ *Daggett v. Colgan*, 92 Cal. 53, 28 Pac. 51, 14 L. R. A. 474. See *Waterloo Woolen Mfg. Co. v. Shanahan*, 128 N. Y. 342, 28 N. E. 358; *U. S. v. Old Settlers*, 148 U. S. 427, 37 L. Ed. 509.

² *Hodges v. Buffalo*, 2 Denio, 110; *Hood v. Lynn*, 1 Allen, 103; *New London v. Brainard*, 22 Conn. 552; *Austin v. Coggeshall*, 12 R. I. 329.

³ *Tash v. Adams*, 10 Cush. 252.

sion as the centennial anniversary of their existence as cities, counties and towns¹ nor for entertainments and dinners for its citizens or guests.² Such contracts are void and even though they have been fully carried out and performed by the contractor with the public body and the latter has had the advantages of performance, there is no liability on the part of the public body.³ Long established custom may not be resorted to as a basis to sustain such contracts and relieve them from invalidity.⁴ A town cannot build places of amusement for its inhabitants,⁵ nor abate taxes.⁶ It may not expend money to obtain a city or town charter⁷ nor to oppose division of the town⁸ nor to pay a private fire company⁹ nor to build a courthouse¹⁰ or a county jail.¹¹ In like manner it may not build a bridge in another town,¹² or contribute to a private cemetery association.¹³ It cannot divide among its inhabitants money received from the State,¹⁴ nor expend money for purposes of local defense.¹⁵ Where, however, power has been conferred upon a city to provide for the entertainment of visitors and to celebrate anniversaries of historical events¹⁶ or where such power has been given

¹ *Love v. Raleigh*, 116 N. C. 296, 21 S. E. 503.

² *Stegmaier v. Goeringer*, 218 Pa. St. 499, 67 Atl. 782.

³ *Hodges v. Buffalo*, *supra*; *Austin v. Coggeshall*, *supra*.

⁴ *Stegmaier v. Goeringer*, *supra*.

⁵ *Stetson v. Kempton*, 13 Mass. 272.

⁶ *Cooley v. Granville*, 10 Cush. 56.

⁷ *Frost v. Belmont*, 6 Allen, 152.

⁸ *Coolidge v. Brookline*, 114 Mass. 592; *Westbrook v. Deering*, 63 Me. 231; *Contra, Farrel v. Derby*, 58 Conn. 234, 20 Atl. 460.

⁹ *Greenaugh v. Wakefield*, 127 Mass. 275.

¹⁰ *Bachelder v. Epping*, 28 N. H. 354.

¹¹ *Drew v. Davis*, 10 Vt. 506.

¹² *Concord v. Boscawen*, 17 N. H. 465.

¹³ *Luques v. Dresden*, 77 Me. 186.

¹⁴ *Hooper v. Emery*, 14 Me. 375.

¹⁵ *Stetson v. Kempton*, *supra*; *Perkins v. Milford*, 59 Me. 315.

¹⁶ *Tatham v. Philadelphia*, 11 Phila. 276.

under general statutes, contracts made in carrying out such celebrations are valid.¹ It may through its selectmen submit disputed claims to arbitration and the award will bind the town.² It may settle cases and employ counsel in appropriate instances.³

¹ *Hill v. Easthampton*, 140 Mass. 381, 4 N. E. 811; *Hubbard v. Taunton*, 140 Mass. 467, 5 N. E. 157.

² *New Haven v. Weston*, 87 Vt. 7, 86 Atl. 996, and cases cited.

³ *Idem*.

CHAPTER XIII

IMPAIRING OBLIGATION OF CONTRACTS

§ 80. Impairment of Obligation.

No absolute right beyond legislative control vests in persons named in a statute upon whom is conferred power to do certain things, and a repeal of the statute will not impair the obligation of a contract.¹ A contract does not spring into existence from the passage of a statute which gave to persons claiming to have paid an illegal tax an opportunity to present to the general governing body of a county a claim for reimbursement.² The power conferred by statute upon a municipality to make a contract to furnish light in its streets without power to make a continuing contract does not prevent the legislature from later repealing the statute and terminating any contract that was made thereunder.³ Empowering municipalities to deal with public service corporations does not compel them so to deal, nor does it confer upon such corporations the exclusive right to sell the commodity.⁴ And where a statute conditionally protects a public service company during the continuance of the statute from

¹ *Wilkes County v. Call*, 123 N. C. 308, 31 S. E. 481, 44 L. R. A. 252; *People ex rel. v. Montgomery Co.*, 67 N. Y. 109, 23 Am. R. 94.

² *People ex rel. Canajoharie Nat. Bk. v. Montgomery Co.*, 67 N. Y. 109, 23 Am. R. 94.

³ *Richmond Co. G. Co. v. Middletown*, 59 N. Y. 228; *Contra*, *Cits. W. Co. v. Bridgeport Hyd. Co.*, 55 Conn. 1, 10 Atl. 170; *White v. Meadville*, 177 Pa. St. 643, 35 Atl. 695.

⁴ *Cits. Elec. L. & P. Co. v. Sands*, 95 Mich. 551, 55 N. W. 452; *Andrews v. South Haven*, 187 Mich. 294, 153 N. W. 827.

municipal competition such a statute confers no new or additional franchise and creates no contract and its repeal will leave the municipality free to compete.¹ The grantee of the charter takes nothing by implication. There is no prohibition against granting another charter for a similar franchise.² Provisions in charters or statutes whereby the State barter away its powers of sovereignty, such as the police power, the power of taxation or the power of eminent domain are void. No rights vest, no powers are conferred and no contract arises from such provisions and when questioned are not protected by the contract clause of the Federal Constitution.³

When a municipality enters into a lawful contract which it had the power to make, the legislature may not deprive it of its power to carry it out, nor can it impair its obligation.⁴ A franchise granted to and accepted by a public service company on specified conditions is a contract and cannot be impaired without the company's consent.⁵ And rights acquired under a statute of a State which is in its nature a contract and which does not reserve to the legislature the power of repeal cannot be divested by subsequent legislation.⁶ But it is otherwise where the power is reserved.⁷ The exclusive right to light streets with gas for a definite period is not impaired by a later contract

¹ *Re Brooklyn*, 143 N. Y. 596, 26 L. R. A. 270, 166 U. S. 685.

² *Re Brooklyn, supra*; *Skaneateles W. Co. v. Skaneateles*, 161 N. Y. 154, 55 N. E. 562; *Sears v. Akron*, 246 U. S. 242, 62 L. Ed. 688.

³ *Hyde Park v. Oakwoods Cemetery Assn.*, 119 Ill. 141, 7 N. E. 627; *Matter of McAneny*, 198 N. Y. App. Div. 205, *aff'd* 232 N. Y. 377; *Williamson v. New Jersey*, 130 U. S. 189, 32 L. Ed. 915, *aff'g* 44 N. J. L. 165; *Saginaw County v. Bubinger*, 137 Mich. 72, 100 N. W. 261; *Westminster W. Co. v. Westminster*, 98 Md. 551, 56 Atl. 990.

⁴ *Goodale v. Fennell*, 27 Ohio St. 426, 22 Am. R. 321.

⁵ *New York v. Second Ave. R. Co.*, 32 N. Y. 261.

⁶ *Brooklyn Cen. R. Co. v. Brooklyn C. R. Co.*, 32 Barb. 358.

⁷ *Sears v. Akron, supra*; *Ramapo Water Co. v. New York*, 236 U. S. 579, 59 L. Ed. 731.

with another company to light the same streets by electricity.¹

The repeal of a statute under which an award has been made in condemnation proceedings cannot affect the validity of the award or prevent its payment as it has all the force and effect of a judgment, a contract of the highest nature,² and the validity of judgments may not be impaired.³

Where valid franchises are obtained their exercise may not be held in abeyance for an indefinite time. For although they constitute property they may be forfeited by failure of exercise,⁴ or by subsequent abandonment after they have been exercised.⁵ And when no time is prescribed they must be exercised within a reasonable time.⁶

§ 81. Power to Contract—Obligation of Contract—Power of Public Body to Change Laws Forming Basis of Contract.

Where a contract between the government and its contractor consists of several acts of Congress, the contract when acted upon and in operation is binding upon the government and it cannot, without the consent of its contractor, change the terms of the contract by subsequent legislation.⁷

¹ *Saginaw G. L. Co. v. Saginaw*, 28 Fed. 529.

² *People ex rel. Reynolds v. Buffalo*, 140 N. Y. 300, 35 N. E. 485.

³ *Hadfield v. New York*, 6 Robt. 501.

⁴ *People v. Broadway R. Co.*, 126 N. Y. 29, 26 N. E. 961; *New York Elec. Lines Co. v. Empire City Subway Co.*, 201 N. Y. 329, 94 N. E. 326, *aff'd* 235 U. S. 179, 59 L. Ed. 184.

⁵ *People v. Albany & Vermont R. Co.*, 24 N. Y. 261; *First Construction Co. v. State*, 221 N. Y. 295, 116 N. E. 1020.

⁶ *N. Y. v. Bryan*, 196 N. Y. 158, 89 N. E. 467; *First Construction Co. v. State*, 221 N. Y. 295, 116 N. E. 1020.

⁷ *U. S. v. Cent. Pac. R. Co.*, 118 U. S. 235, 30 L. Ed. 173, *aff'g* 21 Ct. Cl. 180; *Sinking Fund Cases*, 99 U. S. 700, 718, 25 L. Ed. 496.

PART II. CREATION AND FORMATION OF THE CONTRACT

CHAPTER XIV

DEFINITION AND CLASSIFICATION OF CONTRACT

§ 82. The Contract Defined.

A contract is an agreement to do or not to do a particular thing¹ or as more fully stated it is a bargain or agreement voluntarily made upon good consideration, between two or more persons capable of contracting to do or forbear to do some lawful act.² And a public contract is measured and governed by the same laws that control natural persons in contract matters, whether it be the nation,³ State,⁴ city, town or village.⁵ If even the United States, or the States, step down from their position of sovereignty and enter the domain of commerce, they submit themselves to the same laws that govern individuals

¹ Marshall, C. J., in *Sturges v. Crowninshield*, 4 Wheat. (U. S.) 122, 4 L. Ed. 529; *People v. Dummer*, 274 Ill. 637, 113 N. E. 934.

² *Justice v. Lang*, 42 N. Y. 493; *U. S. v. Richards*, 149 Fed. 443; *Virginia City Gas Co. v. Virginia City*, 3 Nev. 320.

³ *Hollerbach v. U. S.*, 233 U. S. 165, 58 L. Ed. 898; *U. S. v. Tingey*, 5 Peters (U. S.), 115, 8 L. Ed. 72; *U. S. v. Bradley*, 10 Peters (U. S.), 343, 9 L. Ed. 448; *U. S. v. Bostwick*, 94 U. S. 53, 24 L. Ed. 65; *Whiteside v. U. S.*, 93 U. S. 247, 23 L. Ed. 882, aff'g 8 Ct. Cl. 532; *Cooke v. U. S.*, 91 U. S. 389, 23 L. Ed. 237; *Skelsey v. U. S.*, 23 Ct. Cl. 61; *Harvey v. U. S.*, 8 Ct. Cl. 501.

⁴ *People ex rel. Graves v. Sohmer*, 207 N. Y. 450, 101 N. E. 164; *State v. Heath*, 20 La. Ann. 172, 96 Am. Dec. 390.

⁵ *Long Beach Sch. Dist. v. Dodge*, 135 Cal. 401, 67 Pac. 499; *Sexton v. Chicago*, 107 Ill. 323; *Vincennes v. Cits. G. Co.*, 132 Ind. 114, 31 N. E. 573, 16 L. R. A. 485; *Hudson E. L. Co. v. Hudson*, 163 Mass. 346, 40 N. E. 109; *Dausch v. Crone*, 109 Mo. 323, 19 S. W. 61; *Jersey City v. Harrison*, 71 N. J. L. 69, 58 Atl. 100; *Horgan v. N. Y.*, 160 N. Y. 516, 55 N. E. 204; *Preston v. Syracuse*, 92 Hun, 301, 158 N. Y. 356, 53 N. E. 39.

there.¹ Governments are bound to observe the same rule of conduct in their contractual relations with their citizens as they require citizens to observe with each other.² Accordingly they become bound by their contracts the same as individuals.³

§ 83. Implied Contracts—Defined and Classified.

Public contracts may be express or implied and while liability has been denied under the theory of an implied contract arising against public bodies, the non-liability exists rather because under the particular circumstances a special mode of contracting was provided by statute, or certain conditions or preliminaries were required to exist or be performed before a contract could be made which was otherwise prohibited, or because the purpose and object of the contract were entirely beyond the corporate powers of the public body. Ordinarily, public bodies when acting within their corporate powers are bound on implied contracts the same as individuals. Implied contracts or quasi contracts are obligations created by law without regard to the assent of the party on whom the obligation is imposed. They are not contract obligations in the true sense, but are constructive contracts created by law and dictated by reason and justice.⁴ Implied contracts are divided into two classes,—obligations implied in fact and obligations implied in law. The former are based upon the actual agreement of the parties which is deduced from their conduct and the circumstances of the case, and all the elements essential to an express contract must appear.

¹ *Cooke v. U. S.*, 91 U. S. 389, 23 L. Ed. 237; *Danolds v. State*, 89 N. Y. 36, 42 Am. Rep. 277.

² *State v. Clausen*, 94 Wash. 166, 162 Pac. 1; *State v. Maddough*, 74 Wash. 649, 134 Pac. 492.

³ *People ex rel. Graves v. Sohmer*, *supra*.

⁴ *People v. Dummer*, 274 Ill. 637, 113 N. E. 934; *Ward v. Kropf*, 207 N. Y. 467.

The latter may arise without there having been a promise or any intention to enter into a contract, and even against an intention to the contrary.¹

While implied contracts are enforceable at law, implied contracts in fact will not arise from mere denials and contentions of parties but from their common understanding in the ordinary course of business, wherefrom mutual intent to contract without formal words is shown.² A contract will not be implied where an express contract would be contrary to law,³ nor where the service or benefit conferred has been given as a gratuity,⁴ for services intended to be gratuitous when rendered, may not afterwards be used as a basis of an implied promise to pay.⁵ A contract may not be implied in fact where the facts are inconsistent with its existence, where there is an express contract concerning the subject-matter, or where an express contract would be contrary to law.⁶ And where a party is incompetent to make an express contract, such incompetency is equally fatal to any theory of implied contract,⁷ for if one is without power to bind by express contract, clearly he cannot by implication. The distinction between express contracts and implied contracts lies, not in the nature of the undertaking, but in the mode of proof.⁸

¹ *Highway Comms. v. Bloomington*, 253 Ill. 164, 172, 97 N. E. 280; *Underhill v. Rutland, R. R. Co.*, 90 Vt. 462, 475, 98 Atl. 1017; *Meade County v. Welch*, 34 S. D. 348, 148 N. W. 601; *Milford v. Comm.*, 144 Mass. 64, 10 N. E. 516; *Bigby v. U. S.*, 103 Fed. 597, 188 U. S. 400, 47 L. Ed. 519.

² *Knapp v. U. S.*, 46 Ct. Cl. 601, 643.

³ *Zottman v. San Francisco*, 20 Cal. 96, 81 Am. Dec. 96.

⁴ *Montgomery County Comms. v. Ristine*, 124 Ind. 242, 247, 24 N. E. 990.

⁵ *Albany v. McNamara*, 117 N. Y. 168, 22 N. E. 931.

⁶ *Miller v. Schloss*, 218 N. Y. 400, 113 N. E. 337; *Creighton v. Toledo*, 18 Ohio St. 447; *Hawkins v. U. S.*, 96 U. S. 689, 24 L. Ed. 607, aff'g 12 Ct. Cl. 181; *Hartman v. U. S.*, 40 Ct. Cl. 133; *Appleton W. Wks. Co. v. Appleton*, 132 Wis. 563, 113 N. W. 44.

⁷ *Curved Electrotype P. Co. of N. Y. v. U. S.*, 50 Ct. Cl. 258; *Beach v. U. S.*, 226 U. S. 243, 260, 57 L. Ed. 205, aff'g 41 Ct. Cl. 110.

⁸ *Montgomery v. Montgomery W. W. Co.*, 77 Ala. 248, 254.

CHAPTER XV

OFFER AND ACCEPTANCE

§ 84. Acceptance of Offer.

In public contracts as in contracts between individuals offer and acceptance are essential elements of contract.¹ An acceptance to constitute or create a binding contract must correspond to the offer at every point and must conclude the agreement,² and the acceptance of the offer, to be effective, if no time is fixed in the offer, must be made within a reasonable time.³ The acceptance of the offer must be unconditioned and an acceptance which varies from the offer in any substantial particular is in effect a rejection, amounts to a new proposition and must be accepted in turn.⁴ Silence is not an acceptance, and an offer to make or alter a contract cannot be transformed into an agreement because the public body makes no reply. Silence will not be taken to mean voluntary assent merely because there is no dissent.⁵ To make a binding agreement, therefore, there must be an acceptance of the offer by word or by act or deed and it must accord to the terms of the offer.⁶ An acceptance of goods sent and

¹ U. S. v. Carlin Construction Co., 224 Fed. 859; Curtis v. Portsmouth, 67 N. H. 506, 39 Atl. 439; Jersey City v. Harrison, 72 N. J. L. 185, 62 Atl. 765; Snow Melting Co. v. New York, 88 N. Y. App. Div. 575; Landsdowne v. Cits. El. L. Co., 206 Pa. St. 188, 55 Atl. 919; Kaukauna E. L. Co. v. Kaukauna, 114 Wis. 327, 89 N. W. 542.

² U. S. v. Carlin Cons. Co., *supra*.

³ U. S. v. Carlin Cons. Co., *supra*.

⁴ Wheaton Bldg. Co. v. Boston, 204 Mass. 218, 90 N. E. 598.

⁵ Beach v. U. S., 226 U. S. 243, 57 L. Ed. 205, aff'g 41 Ct. Cl. 210; Titcomb v. U. S., 14 Ct. Cl. 263.

⁶ Smith v. Nemaha County Sch. Dist., 17 Kan. 313; Baldwin v. Comm., 11

their use,¹ or of materials taken by a county to repair its roads raises an implied promise to pay reasonable value for them.² While voluntary services rendered without knowledge or request do not make an agreement, the acceptance of services under circumstances which no reasonable person would consider a benefaction or a gratuity or charity will imply an acceptance and a promise to pay.³ A distinction is to be observed between an acceptance of an offer and an authorization to some agent of a public body to enter into a contract. For instance, a landowner offers to sell his land to a public body at a price named and the public body authorizes and empowers its chairman to purchase on terms set out by the public body in its authorization. This will not constitute an acceptance but is a naked authorization to buy, which, of course, may be revoked and withdrawn.⁴ But if a landowner offers to sell his land at a fixed price and the public officials vote to purchase it at that price this will, on the other hand, constitute a complete contract and, upon a refusal to take, resort may be had to equity for specific performance.⁵ And when written acceptance is essential to a binding agreement, the entry on the minutes of the council coupled with written acceptance by the contractor suffices.⁶

Bush, (Ky.), 417; *State ex rel. Henderson v. State Prison Commrs.*, 37 Mont. 378, 96 Pac. 736; *Couch v. State*, 14 N. D. 361, 103 N. W. 942.

¹ *U. S. v. Berdan Mfg. Co.*, 156 U. S. 552, 39 L. Ed. 530, aff'g 26 Ct. Cl. 48.

² *Harrison v. Palo Alto County*, 104 Iowa, 383, 73 N. W. 872.

³ *Seagraves v. Alton*, 12 Ill. 371; *Albany v. McNamara*, 117 N. Y. 168, 22 N. E. 931; *Salsbury v. Phila.*, 44 Pa. St. 303.

⁴ *Madden v. Boston*, 177 Mass. 350, 58 N. E. 1024.

⁵ *McManus v. Boston*, 171 Mass. 152, 50 N. E. 607.

⁶ *Ft. Madison v. Moore*, 109 Iowa, 476, 80 N. W. 527; *Aurora W. Co. v. Aurora*, 129 Mo. 540, 31 S. W. 946; *McManus v. Boston*, *supra*; *Argus Co. v. Albany*, 55 N. Y. 495; see *Curtis v. Portsmouth*, *supra*.

§ 85. Acceptance of a Proposal which Follows Advertisement is a Contract.

A proposal in accordance with an advertisement by a public body and the acceptance by the public body of such proposal create a contract of the same force and effect as if a formal contract is written out and signed by the parties.¹

§ 86. Offer—Terms Implied by Law.

As in contracts there are many terms which though not actually stated therein are implied by law, so in the offer which precedes the agreement there are many terms implied by law which are just as binding as if actually set out in the oral or written terms of the contract.² Indeed the very reason that they bind both parties after acceptance is because the law implies them in the offer. Such terms as good faith and fair dealing, that neither party will do anything either to disable or prevent himself or the other party from performing, that existing law forms a part of the contract and is incorporated therein; that the work will be commenced and completed within a reasonable time,³ these and many similar terms the law implies *in limine* in every mutual undertaking and they are implied not merely in the making of the contract but in the performance as well.⁴ And these implied obligations are as much a part of the offer as of the contract, just as if incorporated therein by express language.⁵ Covenants

¹ *Garfield v. U. S.*, 93 U. S. 242, 23 L. Ed. 779; *U. S. v. Purcell Envelope Co.*, 249 U. S. 313, 63 L. Ed. 620.

² *U. S. v. Bostwick*, 94 U. S. 53, 24 L. Ed. 65.

³ *Gardner v. Town of Cameron*, 155 N. Y. App. Div. 750, 756; *Commrs. of Highland County v. Rhoades*, 26 Ohio St. 411; *New York v. Continental Asphalt Co.*, 163 N. Y. App. Div. 486, 218 N. Y. 685, 113 N. E. 1052.

⁴ *Idem.*

⁵ *U. S. v. Bostwick*, 94 U. S. 53, 24 L. Ed. 65.

which the language and intent of the parties necessarily imply will also be supplied to effectuate the contract.¹ Where a public body advertised for bids for the privilege of picking over refuse at public dumps, the law necessarily implies a covenant by the public body to deliver its refuse gathered from the streets at those dumps, since such covenant is indispensable to the effectuation of the contract. It is not a case of an omission by the parties which the courts will not feel justified in supplying, but one where the language used shows that an additional, or correlative covenant was intended, which the courts should and will supply.²

§ 87. Bid as Offer.

In public contracts the offer is usually adduced in response to public advertisement requesting bids upon work therein specified. The legal status of such bids is in frequent controversy. A mere request by a public body for bids to do work is not an offer to accept the bids submitted in response to such advertisement or even to accept the lowest bid. There is no contract, therefore, until acceptance by the public body, either express or implied, after the receipt of the bid. The bid of the prospective contractor is, of course, his offer and if accepted by the public body asking for bids, before it is withdrawn, makes a complete and binding contract.³ And where a formal written contract is desired, it must conform substantially to the terms of the advertisement for bids, the proposal of the bidder, and its acceptance;

¹ *New York v. Delli Paoli*, 202 N. Y. 18, 94 N. E. 1077; *Kinser Cons. Co. v. State*, 125 N. Y. S. 46, 145 N. Y. App. Div. 41, 204 N. Y. 381, 97 N. E. 871. See §§ 158-159, *infra*.

² *New York v. Delli Paoli*, *supra*.

³ *North Eastern Cons. Co. v. North Hempstead*, 121 N. Y. App. Div. 187; *Bull v. Talcott*, 2 Root (Conn.), 119, 1 Am. Dec. 62.

and the bidder may not be required to sign a written contract which contains conditions not included in the offer and acceptance. Neither party may insist upon the introduction of stipulations or conditions not named or implied in their former negotiations.¹

§ 88. Negotiations Preliminary to Contract.

Negotiations which are intended merely to be preliminary to a formal contract, do not create a contract. Public bodies usually seek bids by advertisement. Mere invitations to bid are not offers which will be transformed into a contract by acceptance. The public body is not obliged to accept the offer or make a contract under these circumstances.² It is only where the public body accepts the bid that it becomes a contract.³ It is the contractor's bid that is the offer and its acceptance makes the contract.⁴ No contract can arise even from preliminary negotiations which result in an oral agreement of all the terms, where the contractor as well as the public body understand it is not to be binding until put in writing and signed. Where proposals and an award look to the future execution of a contract, such award is not an agreement but signifies an intention to make one.⁵

Where of course the parties reach an agreement through correspondence, intending a formal writing to be subsequently signed expressing it, the obligatory character of the agreement cannot ordinarily be defeated by either

¹ Highland Co. Commrs. *v.* Rhoades, 26 Ohio St. 411.

² Colorado Paving Co. *v.* Murphy, 78 Fed. 28, 37 L. R. A. 630; Argenti *v.* San Francisco, 16 Cal. 256; Smith *v.* New York, 10 N. Y. 504; State *v.* Ohio Penitentiary, 5 Ohio St. 234; Anderson *v.* Public School, 122 Mo. 61, 27 S. W. 610.

³ Garfielde *v.* U. S., 93 U. S. 242, 23 L. Ed. 779; Smith *v.* Mayor, 10 N. Y. 504.

⁴ Garfielde *v.* U. S., *supra*.

⁵ Edge Moor Bridge Wks. *v.* Bristol County, 170 Mass. 528, 49 N. E. 918; Jersey City Water Comm'rs *v.* Brown, 32 N. J. L. 504, 510.

party refusing to sign such formal contract. When the minds of the parties have met upon a proposal submitted by one and accepted by the other party, and the terms of the contract have been in all respects definitely agreed upon, one of the parties cannot evade or escape from his obligation by refusing to sign the formal writing which both parties understood was to be subsequently drawn and executed.¹ Clearly, where a written contract eventually follows these preliminary negotiations it merges all previous negotiations and is presumed in law to express the final undertaking of the parties.²

§ 89. Meeting the Offer.

An offer of a public body will constitute a valid contract between such public body and any person who brings himself within the provisions of the offer.³ But the assent must comprehend the whole of the proposition. It must be exactly equal to its extent and terms, and must not qualify them by any new terms. A proposal to accept or an acceptance of an offer on terms varying those proposals amounts to a rejection of the offer. The acceptance must be unconditional, and without proviso.⁴ But until an offer is accepted and acted upon it may be withdrawn or modified.⁵ Where an offer is thus withdrawn it no longer outstands to be the subject of an acceptance.⁶

¹ *U. S. v. P. J. Carlin Cons. Co.*, 224 Fed. 859; *Peirce v. Cornell*, 117 N. Y. App. Div. 66. See *Highland County Comm'rs v. Rhoades*, 26 Ohio St. 411; *Jungdorf v. Little Rice*, 156 Wis. 466, 145 N. W. 1092; *Joy v. St. Louis*, 138 U. S. 1; *Slade v. Lexington*, 141 Ky. 214, 132 S. W. 404.

² *Simpson v. U. S.*, 172 U. S. 372, 43 L. Ed. 482, aff'g 31 Ct. Cl. 217.

³ *Gardner v. Hartford*, 14 Conn. 195; *Austin v. Supervisors*, 24 Wis. 278.

⁴ *Baker v. Johnson County*, 37 Iowa, 186; *State ex rel. Henderson v. Board of State Prison Comm'rs.*, 37 Mont. 378, 96 Pac. 736; *U. S. v. P. J. Carlin Cons. Co.*, 224 Fed. 859; *McCotter v. New York*, 37 N. Y. 325; *North Eastern Cons. Co. v. North Hempstead*, 121 N. Y. App. Div. 187.

⁵ *Foster v. Boston*, 39 Mass. 33; *McCotter v. New York*, *supra*.

⁶ *McCotter v. New York*, *supra*.

And, of course, it is no longer open when it is rejected, or when the time limited by its own terms has expired,¹ or in the absence of a time limited for acceptance, after a reasonable time has elapsed.² Performance is of course acceptance. A contingent acceptance does not bind and will not prevent a withdrawal of the offer.³

¹ *Haldane v. U. S.*, 69 Fed. 819; *Potts v. Whitehead*, 20 N. J. Eq. 55, 23 Id. 512.

² *U. S. v. P. J. Carlin Cons. Co.*, 224 Fed. 859, 866.

³ *North Eastern Cons. Co. v. North Hempstead*, *supra*.

CHAPTER XVI

OTHER ELEMENTS OF CONTRACT

§ 90. **Validity of Contract.**

Contracts of public bodies when *ultra vires* because illegal, are void, and no recovery may be had on them even though executed and the benefits of performance are retained by the public body.¹ But where they are *ultra vires* because unauthorized, although they are void if executory, if executed and the public body retains the benefits, a recovery for their reasonable value so far as executed will be sustained.² Void contracts are in contemplation of law no contracts at all and are the same as if no agreement had been undertaken. Therefore contracts in violation of statute will be void. In like manner and for like considerations contracts against public policy³ or obnoxious to good morals⁴ are void and unenforceable. Fraud⁵ will also vitiate a contract as will duress,⁶ undue influence or mistake⁷ but these do not intrinsically defeat the contract but create a voidable validity only. They do

¹ *Portland v. Bitum. Pav. Co.*, 33 Oreg. 307, 52 Pac. 28.

² *Berka v. Woodward*, 125 Cal. 119, 57 Pac. 777; *Bay v. Davidson*, 133 Iowa, 688, 111 N. W. 25.

³ *U. S. v. Cocke*, 207 Fed. 682; *Patterson v. Chambers P. Co.*, 81 Oreg. 328, 159 Pac. 568.

⁴ *Thompson v. St. Charles County*, 227 Mo. 220, 126 S. W. 1044.

⁵ *Bd. Water Comm'rs v. Robbins*, 72 Conn. 623, 74 Atl. 938; *Richards v. Sch. Tp. of Jackson*, 132 Iowa, 612, 109 N. W. 1093; *Baird v. New York*, 96 N. Y. 567.

⁶ *Harrison Tp. v. Addison*, 176 Ind. 389, 96 N. E. 146; *Memphis v. Brown*, 20 Wall. 289, 307, 22 L. Ed. 264; *Koewing v. West Orange*, 89 N. J. L. 539, 99 Atl. 203.

⁷ *Griffith v. Sebastian County*, 49 Ark. 24, 3 S. W. 886; *State v. Paup*, 13 Ark. 129.

not destroy the contract but may be availed of to defeat it. On the other hand, the party injured may affirm the contract and sue for the damages which he has suffered because of the existence or imposition of any of these vitiating facts or conditions. Where the fraud complained of is in the execution of the contract, it may be avoided at law, since the assent necessary to constitute a binding contract is lacking. Fraud in the consideration, however, is usually only the subject of cognizance by a court of equity in order to have relief from the contract, since in this class of cases there is assent both to the contract and its execution, but there is deceit with reference to the value or character of the consideration received. Mistake as to the law or ignorance of the law will not excuse. Every one is presumed to know the law. But this presumption does not accord with fact. No one can know all the law, and some know very little. The presumption is, however, essential for government to endure. Otherwise the greater the ignorance of law the greater would be the license to violate it.¹ It has been said, however, that while ignorance of the law is not a valid excuse, contractors engaged in work over the country cannot be expected to be familiar with every detail of city and town charters, and where an honest mistake was made in attempting to comply with the city charter, and no damage resulted, recovery would be allowed so far as a contract was executed.²

But while mistakes as to law will not relieve a contractor or a public body for liability for his act, in cases where intent or good faith is the issue, the party's knowledge of the law may be material.³ When the mistake is not

¹ Knowles v. New York, 176 N. Y. 430, 438, 68 N. E. 860.

² Konig v. Baltimore, 128 Md. 465, 97 Atl. 837.

³ Knowles v. New York, *supra*, at page 439; U. S. v. Realty Co., 163 U. S. 427, 41 L. Ed. 215.

mutual, and a contractor in making his bid overlooks a part of the proposed contract work, since he has not been led into error by anything said or done by the other party, he is remediless.¹ When a provision or stipulation in a contract has no obvious meaning, or is reasonably capable of diverse interpretation and in fact is differently understood by the parties, there is no agreement.² But where there is simply a misconception in the interpretation of the language of a contract or specifications and of its effect this is not a mistake of fact, but one of law, against which the courts afford no remedy.³ But a court of equity will relieve against a mistake of fact superinduced by a mistake of law.⁴ The validity of public contracts is generally presumed since public officers who make them are presumed to act within the limits of their authority in good faith, and for the best interests of the public body they represent.⁵

§ 91. Essential Elements of Contract.

To create a valid public contract, there must be authority to make it;⁶ it must relate to a subject-matter within the scope of the corporate powers of the public body,⁷ and of course must be upon sufficient consideration.⁸ Mutuality of contract is also an essential element.⁹ The parties must agree upon all the terms and conditions of

¹ *American Water Softener Co. v. U. S.*, 50 Ct. Cl. 209.

² *Wheaton Bldg. & Lumber Co. v. Boston*, 204 Mass. 218, 90 N. E. 598.

³ *Wheaton B. & L. Co. v. Boston*, *supra*.

⁴ *Griffith v. Sebastian County*, 49 Ark. 24, 3 S. W. 886.

⁵ *Reed v. Anoka*, 85 Minn. 294, 88 N. W. 981; *Memphis v. Brown*, 20 Wall. (U. S.) 289, 22 L. Ed. 264; *Lincoln v. Sun Vapor Street L. Co.*, 59 Fed. 757, 760; *Brown v. Bd. of Education of Pomona*, 103 Cal. 531, 37 Pac. 503.

⁶ *Bosworth-Chanute Co. v. Brighton*, 272 Fed. 964.

⁷ See cases, § 58, *ante*.

⁸ *U. S. v. Cooke*, 207 Fed. 682, 687.

⁹ *New York v. Delli Paoli*, 202 N. Y. 18, 94 N. E. 1077; *U. S. v. McMullen*, 222 U. S. 460, 56 L. Ed. 269; *Toomey v. Bridgeport*, 79 Conn. 229, 64 Atl. 215,

the contract, and their minds must meet upon its terms and subject-matter.¹ If any part remains to be settled, the agreement is incomplete.² They must agree upon plans and specifications which are definite and certain, as to kinds, quality and character of materials and workmanship, the time of completion, the price and method of payments. If these are not definitely settled, no intelligible contract can result and the parties are without remedy against each other. Accordingly, the language of the agreement in relation to these and other matters of the contract must be so clear and intelligible as to make the contract capable of being performed.³ The meaning and intent of the public body and its contractor must be capable of ascertainment from the language used to a reasonable degree of certainty.⁴ Where there is an irreconcilable conflict between essential provisions of the assumed contract for public work and the specifications, and the latter cannot be ignored, the contract will be void for uncertainty and cannot be enforced.⁵ Where, accordingly, an owner of land offers to sell all his land on an island to a public body which accepts by offering to buy all lands on the island which has many ownerships, there is no meeting of the minds.⁶ Where the price is not fixed the contract is incomplete and there remains an essential element still to be negotiated.⁷ Where a method of fixing the price by two

¹ *People's Railroad v. Memphis Railroad*, 10 Wall. (U. S.) 38, 19 L. Ed. 844, aff'g 4 Coldw. 406; *McCotter v. New York*, 37 N. Y. 325.

² *McCotter v. New York*, *supra*.

³ *Lyle v. Jackson County*, 23 Ark. 63.

⁴ *U. S. v. Ellicott*, 223 U. S. 524, 56 L. Ed. 535; *U. S. v. McMullen*, 222 U. S. 460, 56 L. Ed. 269; *Long v. Battle Creek*, 39 Mich. 323, 33 Am. R. 384; *Wheaton Bldg. & L. Co. v. Boston*, 204 Mass. 218, 90 N. E. 598; *Eugene v. Chambers P. Co.*, 81 Oreg. 352, 159 Pac. 576; *Patterson v. Chambers Power Co.*, 81 Oreg. 328, 159 Pac. 568.

⁵ *U. S. v. Ellicott*, *supra*.

⁶ *McCotter v. New York*, *supra*.

⁷ *Idem*.

arbitrators is suggested in the offer, the additional term in the acceptance that if they cannot agree, a third arbitrator shall be called in, prevents a meeting of the minds and therefore a contract.¹

§ 92. Delivery Essential.

To create a binding written contract, there must be a delivery of the instrument expressing it.² The delivery, however, is no part of the contract and is not proved by it. Delivery is an act done in reference to the contract and is indispensable to give it efficacy. The act of delivery intervenes between the execution of the contract and the time when it becomes operative. Proof of delivery, accordingly, is usually to be established by parol and it is a question of fact to be determined from all the conflicting evidence in the case.³ Delivery may, however, be upon condition. And the annexing of conditions to delivery is not an oral contradiction of the writing. There must be a delivery to make the writing binding in any degree, and the extent that it shall have effect and bind the parties, may be limited by the conditions annexed to its delivery. Delivery may sometimes be complete upon acceptance in accordance with modes recognized in commercial business. It is a universal rule that when an offer is made by one person to another the minds of the parties meet and a contract is deemed to be concluded, when such offer is accepted in a reasonable time, either by telegram duly sent in the ordinary way or by letter duly posted to the proposer, as long as either is done before a withdrawal of the offer to the knowledge of the acceptor.⁴

¹ *Idem.*

² *Blanchard v. Blackstone*, 102 Mass. 343.

³ *Springfield v. Harris*, 107 Mass. 532.

⁴ *Burton v. U. S.*, 202 U. S. 344, 384, 50 L. Ed. 1057; 2 Kent Comm. 477.

§ 93. Assent.

The acceptance which will create a valid and binding contract is one which is unequivocal, unconditional and unvarying from the offer. The assent of the parties to the terms and subject-matter of the contract must be mutual, and they must assent to the same thing in the same sense. Absolute acceptance, therefore, of an offer coupled by any qualification or condition will not constitute a completed contract because there is lacking this essential mutuality of assent.¹

If parties intend to contract orally and there is a misunderstanding as to the terms, neither is bound because their minds have not met. Where the contract is written and similar misunderstanding arises, a court of equity will refuse to enforce it.² But misunderstanding of terms not capable of reasonable misconstruction will not obviate the contract. Error in interpretation, or misconception of the legal effect of language, cannot avoid it.³ A contract is not concluded so long as in contemplation of both parties to it, something remains to be done to establish contract relations. The law does not make a contract when the parties intend none, nor regard an arrangement as completed which the parties to it regard as incomplete.⁴ Nor does it compel assent to a contract composed of several instruments which are in irreconcilable conflict, and none of which may be disregarded.⁵ There may, however, be assent to a contract without full

¹ State *ex rel.* Henderson *v.* Bd. of State Prison Commrs., 37 Mont. 378, 96 Pac. 736; Lord & Hewlett *v.* U. S., 217 U. S. 340, 54 L. Ed. 790, aff'g 43 Ct. Cl. 282; U. S. *v.* P. J. Carlin Cons. Co., 224 Fed. 859; Tilley *v.* County of Cook, 103 U. S. 155, 26 L. Ed. 374.

² Scott *v.* U. S., 12 Wall. 443, 445; Hume *v.* U. S., 132 U. S. 406, 33 L. Ed. 393, aff'g 21 Ct. Cl. 328.

³ Wheaton Bldg. & Lum. Co. *v.* Boston, 204 Mass. 218, 90 N. E. 598.

⁴ Central Bitulithic Pav. Co. *v.* Vil. of Highland Park, 164 Mich. 223, 129 N. W. 46.

⁵ U. S. *v.* Ellicott, 223 U. S. 524, 56 L. Ed. 535.

knowledge of its terms, as where a contractor, who has an opportunity to read a contract before signing it, executes it. He cannot, except where the contents of the writing itself are misrepresented to him, escape the obligation of his contract by showing that he signed the contract without reading it.¹ A contractor is presumed to know what he signs.²

§ 94. Reality of Assent.

If a contract is entered into because of the assumed existence of certain facts, which do not in reality exist, no contract arises. In such event the contract is nullified in its inception by the non-existence of material facts which constituted at once its inducement and the foundation of all negotiations. Mistake as to such excludes real assent, and the possibility of a meeting of minds.³ Courts of equity under such circumstances frequently decree the surrender and cancellation of agreements.⁴ And in addition a recovery is allowed for what has been done under the contract so far as executed.⁵ If the contract is executory and the contractor refuses to proceed with performance for such reasons he may defend an action by the public body and set up the lack of real assent. Where the mistake is unilateral and is induced by no fraud, concealment or inequitable conduct of the other party and the true state of facts could be ascertained by ordinary diligence on the part of the mistaken party, equity will not relieve. Equity only assists the vigilant. Conscience, good faith and reasonable diligence are necessary to rouse a court of equity to action.

¹ *Stone v. Prescott Spec. Sch. Dist.*, 119 Ark. 553, 178 S. W. 399.

² *People v. Dunbar Cont. Co.*, 215 N. Y. 416, 424, 109 N. E. 554.

³ *Griffith v. Sebastian County*, 49 Ark. 24, 3 S. W. 886; *Long v. Athol*, 196 Mass. 497, 82 N. E. 665; *U. S. v. Charles*, 74 Fed. 142.

⁴ *U. S. v. Charles*, *supra*; *Long v. Athol*, *supra*.

⁵ *Long v. Athol*, *supra*. See *Hayes v. Nashville*, 80 Fed. 641.

Where, however, the true state of facts could only be revealed by careful and accurate scaling of maps and drawings and by processes of computations by specially skilled persons, the failure to follow such course will not be such negligence as will deny relief. Such would not be ordinary but extraordinary diligence.¹ And in some instances equity may rescind an apparent contract for the mistake of one party only, without a finding of fraud or inequitable conduct in the other.²

§ 95. Mutuality Essential.

Where reciprocal promises are not equally obligatory upon each of the parties, the agreement is *nudum pactum* and void for want of mutuality. Where one of the parties is not bound to do anything there is a lack of mutuality which makes the agreement void.³ But merely because one party to a contract has a privilege or right which the other party has not is not want of mutuality.⁴ Therefore, a privilege to a town, under a contract to purchase water works, to inspect the books and vouchers of the water company, even though it might not exercise its right to purchase, will not make it unmutual.⁵ But if one party only is bound to perform, this is a clear instance of want of mutuality.⁶ However, there are cases where, although exact words are wanting to bind a public body to do its

¹ Long v. Athol, *supra*.

² Harper v. Newburgh, 159 N. Y. App. Div. 695; New York v. Dowd Lumber Co., 140 N. Y. App. Div. 358; Moffett & Co. v. Rochester, 178 U. S. 373, 44 L. Ed. 1108.

³ Farrell v. County of Greenlee, 15 Ariz. 106, 136 Pac. 637; Taber v. Dallas County, 101 Tex. 241, 106 S. W. 332; Storm v. U. S., 94 U. S. 76; State *ex rel.* v. Holcomb, 46 Neb. 612, 65 N. W. 873.

⁴ Mayor of Boonton v. United W. S. Co., 88 N. J. Eq. 61, 102 Atl. 454, 84 N. J. Eq. 197, 93 Atl. 1086, 83 N. J. Eq. 536, 91 Atl. 814.

⁵ Mayor of Boonton v. United W. S. Co., *supra*.

⁶ Harley v. Chicago San. Dist., 107 Ill. App. 546.

part under a contract, the courts will imply a covenant to perform which the language used by the parties shows was intended as indispensable to effectuation of the contract. Under such covenant thus necessarily implied each party to the contract would have mutuality of remedy.¹

Reservations in public contracts to annul or change contracts involve sometimes the question of mutuality. The reserved right on the part of one party to terminate a contract will not destroy the mutuality of a contract, since it is simply an option which the parties contract with reference to, and which may or may not be exercised.² Such a provision to terminate or annul a contract is frequently found in public contracts. In like manner, a reserved power to change details is often provided. Where such exists, it does not create a lack of enforceability of contract because of want of certainty or mutuality, especially where there are provisions for ascertaining a change in compensation should any change in contract be deemed proper.³ This principle of mutuality of contract does not apply to executed contracts. Where one party has actually received the consideration of a written contract, it is no defense to an action brought against him for breach of his covenants to assert that the agreement did not bind his adversary to perform his promises, as long as it appears that the latter did in fact perform such promises in good faith and without prejudice.⁴

§ 96. Definiteness and Certainty are Essential.

Public contracts to be valid and enforceable must be definite and certain both as to the character and extent

¹ New York *v. Delli Paoli*, 202 N. Y. 18, 94 N. E. 1077.

² *Taber v. Dallas County*, *supra*.

³ *U. S. v. McMullen*, 222 U. S. 460, 56 L. Ed. 269.

⁴ *Storm v. U. S.*, 94 U. S. 76, 83, 24 L. Ed. 42.

of the obligations and duties which each party must render to the other thereunder.¹ But if there is a patent ambiguity merely in one clause of a contract which renders it void for uncertainty, the nullity of such clause will not affect the remainder of the instrument, if enough is left to constitute a complete contract.² And where the parties leave to the court by the very terms of a contract to provide what regulations and what fair and equitable compensation should be paid thereunder, such a contract is neither void for uncertainty or for want of mutuality.³ Renewal contracts are oftentimes the subject of suit where the compensation during the extension period is to be fixed by agreement or by arbitrators, and where one of the parties will neither agree nor appoint arbitrators, the courts will undertake to carry out and enforce the provisions of the contract in such regard.⁴ A contract is not void for uncertainty merely because no definite term of duration is fixed, as long as some act or event is made the period of expiration. Such an uncertainty will not render the contract terminable at will.⁵ Nor will a contract be void for want of certainty as to the terms of compensation thereunder, if such compensation is capable of being rendered certain by reference to a standard provided in the contract. That is certain which may be rendered certain.⁶ But an agreement by a school trustee to pay good wages is too indefinite and uncertain to support an action.⁷ The language of the contract must, however, be

¹ *Lyle v. Jackson County*, 23 Ark. 63; *Atkins v. Van Buren Sch. Tp.*, 77 Ind. 447; *Long v. Battle Creek*, 39 Mich. 323.

² *State v. Racine Sattley Co.*, 134 S. W. (Tex.) 400.

³ *Joy v. St. Louis*, 138 U. S. 1, 34 L. Ed. 843.

⁴ *Slade v. Lexington*, 141 Ky. 214, 132 S. W. 404. See *Joy v. St. Louis*, *supra*.

⁵ *Superior v. Douglas County Tel. Co.*, 141 Wis. 363, 122 N. W. 1023.

⁶ *Caldwell v. School Dist. Lake County*, 55 Fed. 372.

⁷ *Fairplay Sch. Tp. v. O'Neal*, 127 Ind. 95, 26 N. E. 686.

such as when interpreted makes a contract capable of performance. A building contract should at least permit of the erection of a building of known dimensions to possess that certainty which will call for enforcement.¹ The meaning of a contract must of course be capable of ascertainment to be sustained.² But even if it be physically impossible to construct a building according to plans and specifications, and if ordinarily such a situation might admit of recovery on quantum meruit for work done, this is not permissible where it would exceed a fixed sum authorized to be expended about which there was no uncertainty.³

§ 97. Consideration.

A promise is, of course, a good consideration for a promise. A seal will import a consideration or at any rate render proof of it unnecessary. But when not under seal, every contract must have a consideration to support it. Inadequacy of consideration, in the absence of fraud or undue influence, does not destroy the obligation of the contract. Any benefit or advantage accruing to the party making a promise, or any loss or disadvantage incurred by the party for whose benefit the promise is made, will be a sufficient consideration. Of course, if a consideration wholly fails the promise cannot be enforced.⁴ Where a party is under obligation of law to do something and he requires something additional to be done or paid before he will perform what is already his legal duty, a contract made or given under such circumstances is wholly without

¹ *Lyle v. Jackson County*, 23 Ark. 63.

² *U. S. v. Ellicott*, 223 U. S. 524, 56 L. Ed. 535; *U. S. v. McMullen*, 222 U. S. 460, 56 L. Ed. 269; *Long v. Battle Creek*, 39 Mich. 323.

³ *Turney v. Bridgeport*, 55 Conn. 412, 12 Atl. 520.

⁴ *State v. Illyes*, 87 Ind. 405; *Scott v. U. S.*, 12 Wall. 443; *Hume v. U. S.*, 132 U. S. 406.

consideration.¹ The doing of what one is already bound to do upon a further promise or obligation, makes the promise or obligation without consideration. Where a duty accordingly is expressly imposed by law upon a public official and no fee or other compensation therefor is allowed by law, no audit or allowance of such a claim can be made and an agreement to pay extra compensation creates no binding obligation,² and this is true whether the extra compensation is or is not forbidden by law.³ The question often arises again in connection with the performance of public contracts, where a contractor with a public body having entered into a contract and upon its performance refuses to further perform, unless given an increased compensation. If in such circumstances the public body promises an increased price to induce the contractor to continue performance, the latter promise is founded upon a valuable consideration.⁴ The theory upon which a consideration seems to be worked out is that a contractor has the legal right on general principles to violate, abandon or renounce his contract upon the usual terms of compensation to the other for damages which the law recognizes and allows, and this right is universally recognized and acted upon.⁵ If the contractor waives this right to stop and pay damages, the waiver of such right will support the new promise, if this be a new contract.⁶

There is no rule of law which hinders a public body

¹ McCook County v. Burstad, 30 S. D. 266, 138 N. W. 303.

² Wadsworth v. Bd. of Supervisors, 217 N. Y. 484, 499, 112 N. E. 161.

³ Wadsworth v. Bd. of Supervisors, *supra*; McCook County v. Burstad, *supra*; Rochester v. Campbell, 184 Ind. 421, 111 N. E. 420.

⁴ U. S. v. Cooke, 207 Fed. 682, 688; Parrott v. Mexican C. R. Co., 207 Mass. 184, 93 N. E. 590; Domenico v. Alaska Packers' Assn., 112 Fed. 554, 557; Rowe v. Peabody, 207 Mass. 226, 93 N. E. 604.

⁵ Lord v. Thomas, 64 N. Y. 107.

⁶ Lattimore v. Harsen, 14 Johns. 330; Vanderbilt v. Schreyer, 92 N. Y. 392, 402; Abbott v. Doane, 163 Mass. 433, 40 N. E. 197; Rowe v. Peabody, *supra*.

having power to make a public improvement, and incidentally the power to contract for doing the work, from increasing the contract price, under circumstances, equitably justifying it, unless prohibited from doing so in its charter.¹

An agreement to pay more, or to pay less, or to alter or modify the terms of an existing parol agreement made under the circumstances indicated constitutes a valid new contract. Of course, the intent of the parties as to what the new agreement is will control. If the agreement is made in consideration of the new promise, it is binding when made. If the agreement is in consideration of the performance of the promise, then the agreement is only binding as it becomes executed. An accord is reached when, in any case, the agreement between the parties is complete. And in the case of change in a contract under seal, the modification being by parol, it is only valid if executed, but not if executory. But this latter rule does not prevent, either under the common law or now, the modification of a valid executory parol agreement by a new executory parol agreement.²

§ 98. Fraud Avoids a Contract.

A contract procured through fraud is voidable, not void, and unless tainted by illegality or contrary to public policy it may be subsequently ratified.³ Fraud when charged must be proved and is not presumed.⁴ Where fraud may even be found to exist in the making of a contract, it may not be avoided on that ground if, after knowledge of the

¹ *Meech v. Buffalo*, 29 N. Y. 198, 214; *Atlantic City v. Warren Bros.*, 226 Fed. 372; *Rowe v. Peabody*, *supra*. See *Gordon v. State*, 233 N. Y. 1.

² See §§ 165, 309, *post*.

³ *Richards v. School Tp. of Jackson*, 132 Iowa, 612, 109 N. W. 1093.

⁴ *Baird v. Mayor*, 96 N. Y. 567, 593.

fraud, the public body accepts and retains the property delivered under the contract. This rule applies to public corporations, the same as to private individuals.¹ It is the duty of all parties who have been induced to enter into the making of an executory contract for the purchase of property, through fraud, if they desire to avail themselves of such objection, to act upon the first opportunity and rescind it by repudiating its obligations and restoring whatever has been received under it immediately upon discovering the alleged fraud. If they delay acting, and retain the property delivered beyond a reasonable time to act, or accept performance after such discovery, they are held to have ratified the contract and waived objections to it. Such a contract is not void but is simply voidable at the option of a party defrauded and requires affirmative action on his part to relieve himself from its obligations.² It is not competent for a public corporation, any more than for a private individual, to relieve itself from its contract obligations by assailing the general character and reputation of its lawful agent, or to repudiate the performance of its promises on the ground of the infidelity of its agent in other transactions.³ While fraud may be established indirectly from circumstantial evidence, when such is relied on, it must be by the proof of such circumstances as are irreconcilable with any other theory than that of the guilt of the persons accused. When the facts are as consistent with innocence as with guilt, proof of fraud is lacking.⁴

While it is true that one who is led into a contract by fraud is privileged to repudiate an executory contract,

¹ *Baird v. Mayor*, 96 N. Y. 567.

² *Idem.*

³ *Idem.*

⁴ *Idem.*

if, and only if, he proceeds to do so promptly upon discovery of the fraud, or within a reasonable time thereafter, he may, however, pursue another course where the contract is partly executed at the time of the discovery of the fraud, that is, he may continue in the execution of the contract, and seek his redress for the fraud in an action to recover damages.¹ Fraud may consist of representations as to the quantities of different kinds of work and material needed under a contract, claimed by the public body, although furnished as estimates and approximations, to be approximately accurate and the result of expert engineering examination, and these are to be regarded not as representations of opinion but of fact.² Although all prior agreements, proposals, negotiations and bids became merged in the contract, such merger does not prevent these or any other matter antecedent to the execution of the contract from becoming the foundation of a claim of fraud.³ The engineer of such a public body is their agent, having the control and direction of the construction of a public work, and such public body is liable for his action including statements and representations, in all that he did within the scope of his agency. Such public body may not claim immunity from the consequences of what he did within the line of his duty.⁴ Merely because a party to a public contract sets up that the instrument signed was not the agreement of the parties would not preclude an attempt to avoid the contract on the ground that he was induced to enter into the contract and execute it because of the fraud of the

¹ *New London v. Robbins*, 82 Conn. 623, 74 Atl. 938.

² *New London v. Robbins*, *supra*; *Wheaton Bldg. & L. Co. v. Boston*, 204 Mass. 218, 90 N. E. 598.

³ *New London v. Robbins*, *supra*.

⁴ *Idem*.

public body. The contractor will not be estopped to change his ground of avoidance.¹

§ 99. Illegality.

Illegal agreements are void and will not be enforced. A contract to induce public officers to act corruptly, or to bias them in the discharge of their official duties, is against public policy and void and one who induces such officers to act corruptly may not when the vice is disclosed, retire from the transaction, with his consideration returned to him, as if he had acted with honesty and in good faith.² Nor will such corruption be healed and a contract tainted with bribery made whole by the retirement of the erring official from his public office.³ If this could wipe out the guilt a new method of successful bribery would be set up. Any effort to further or enforce a previous illegal and corrupt agreement is in like degree void. The only way the illegality may be overcome or obviated is by a new contract upon a new and lawful consideration.⁴ And even where the benefits of the illegal transaction are retained no liability upon an implied contract to pay for such benefits will arise.⁵ The general rule is that a contract which is illegal because expressly prohibited, is void and no one can acquire any rights under it, not even by performance in whole or in part. Parties to illegal contracts are left where

¹ *New London v. Robbins*, *supra*.

² *State v. Cross*, 38 Kan. 696, 17 Pac. 190; *Lindsey v. Philadelphia*, 2 Phila. 212.

³ *McMillan v. Barber A. P. Co.*, 151 Wis. 48, 138 N. W. 94.

⁴ *McMillan v. Barber A. P. Co.*, *supra*; *Chippewa B. Co. v. Durand*, 122 Wis. 85, 99 N. W. 603.

⁵ *Medina v. Dingleline*, 211 N. Y. 24, 104 N. E. 1118; *Hart v. New York*, 201 N. Y. 45, 94 N. E. 219; *Richardson v. Scotts Bluff County*, 59 Neb. 400, 81 N. W. 309; *Norbeck & Co. v. State*, 32 S. D. 189, 142 N. W. 847; *Palmer v. State*, 11 S. D. 78, 75 N. W. 818; *Smith v. Albany*, 61 N. Y. 444; *Berka v. Woodward*, 125 Cal. 119, 57 Pac. 777; *Northport v. Northport T. Co.*, 27 Wash. 543, 68 Pac. 204.

the law finds them. It will not aid them to extricate themselves from a situation of their own creation.¹

It is not necessary that a statute shall pronounce an act void or expressly prohibit it, in order to make a contract founded on such statute void so long as such action is made penal. A contract that is declared null and void by express statute is in like manner just as null and void as if made penal. The effect upon a contract is the same in either event.² There are certain exceptions to the rule that no recovery will be permitted. Where a contract is merely unauthorized or is merely *malum prohibitum* not involving moral turpitude, or there has been some defect in execution not substantial, and in other cases where public policy is promoted or where the parties are not in *pari delicto* or the prohibition of the statute has not been levelled against them, a recovery to the extent of compelling restoration of property or its value is permitted.³ The provisions of a statute which prohibit certain contracts are not the subject of waiver by a public body to the extent of permitting compensation for work done and materials furnished upon the basis of *quantum meruit*.⁴ If a contract contains conditions some of which are legal, and others of which are not, and they are separable, the legal ones will be enforced and the illegal ones disregarded.⁵ And where an agreement has two or more distinct stipula-

¹ *Norbeck & Co. v. State*, 32 S. D. 189, 142 N. W. 847; *Harrison Tp. v. Addison*, 176 Ind. 389, 96 N. E. 146; *Worcester v. Eaton*, 11 Mass. 378; *Hough v. New York*, 145 N. Y. App. Div. 718; *Carranza v. Hicks*, 190 S. W. (Tex.) 540.

² *Norbeck & Co. v. State*, *supra*; *Berka v. Woodward*, *supra*.

³ *Berka v. Woodward*, *supra*; *Bay v. Davidson*, 133 Iowa, 688, 111 N. W. 25; *Hill County v. Shaw & B. Co.*, 225 Fed. 475; *Parkersburg v. Brown*, 106 U. S. 487, 503, 27 L. Ed. 238.

⁴ *Medina v. Dingledine*, 211 N. Y. 24, 104 N. E. 1118.

⁵ *U. S. v. Hodson*, 10 Wall. 77 U. S. 395, 408, 19 L. Ed. 937; *Ohio v. Findley*, 10 Ohio, 51; *U. S. v. Bradley*, 10 Pet. (U. S.) 343, 9 L. Ed. 448.

tions or promises, one of which is against public policy, and the others are not, the illegality of the one will not relieve from liability upon the promises or stipulations which are valid.¹ Where one of two considerations or a distinct part of one consideration, is unlawful because forbidden by statute, or the common law, the illegality taints the entire contract and makes it wholly void. This is so, because, whether the promise is to perform one lawful act, or several acts, some of which are illegal, the entire contract is vitiated, since the consideration permeates the whole and is the basis of the promises.² Where property real or personal has been acquired by means of a contract forbidden by some constitutional or legislative enactment, or otherwise unauthorized, the seller while denied an enforcement of the illegal agreement may recover the specific property in all cases where it can be clearly identified, by a return of all, if anything, that he may have received by virtue of the contract of sale.³ When a contract is void for want of power to make it, a court of equity has no jurisdiction to enforce such a contract. Courts of equity cannot disregard statutory and constitutional requirements any more than courts of law, and may not interpose their power to give validity to such a contract.⁴

¹ *McMullen v. Hoffman*, 174 U. S. 639, 666, 43 L. Ed. 1117, aff'g 83 Fed. 372, 45 L. R. A. 410; *U. S. v. Mora*, 97 U. S. 413, 24 L. Ed. 1013; *McCullough v. Virginia*, 172 U. S. 102, 43 L. Ed. 382; *Gelpeke v. Dubuque*, 1 Wall. (U. S.) 175, 17 L. Ed. 520; *State v. Williams*, 29 Ohio St. 161; *State v. Perrysburg Bd. of Educ.*, 35 Ohio St. 519; *U. S. T. G. Co. v. Brown*, 166 N. Y. App. Div. 688, 217 N. Y. 628; *Hart v. New York*, 201 N. Y. 45, 94 N. E. 219; *Worcester v. Eaton*, 11 Mass. 368.

² *State v. Wilson*, 73 Kan. 343, 84 Pac. 737. See *Hart v. New York*, *supra*.

³ *Ft. Worth v. Reynolds*, 190 S. W. (Tex.) 501; *Parkersburg v. Brown*, 106 U. S. 487, 27 L. Ed. 238. See *Bartlett v. Lowell*, 201 Mass. 151, 87 N. E. 195.

⁴ *Hedges v. Dixon County*, 150 U. S. 182, 192, 37 L. Ed. 1044, aff'g 37 Fed. 304.

§ 100. Public Policy.

It is against the general policy of the law to restrict the power of citizens to make any kind of a contract which they may see fit to enter into so long as the proposed contract does not affect the morals or well-being of society to such a degree as to be against public policy.¹ Contracts opposed to the public policy of a State or nation are void.² All agreements for pecuniary considerations to control the business activities of government, the administration of justice, appointments to office, the course of legislation are void, and where such contracts are in controversy it matters not that a particular contract is free from any taint of actual fraud, oppression or corruption. It is the general tendency of such contracts which condemns them all as belonging to a class which the law will not tolerate.³ Agreements to influence official action or secret agreements whereby officials are to share in profits of contracts which they enter into are void. Public policy and good morals forbid a public official from having a personal interest in bids or contracts, lest he might advance his own interests at the expense of the public body, and allow the hope of personal gain to prevent a faithful discharge of his public duties.⁴ Contracts made by a public body with its own agents and officers are likewise void on grounds of public policy both at the common law and under various statutes

¹ *Patterson v. Chambers P. Co.*, 81 Oreg. 328, 159 Pac. 568; *Eugene v. Chambers P. Co.*, 81 Oreg. 352, 159 Pac. 576.

² *State v. Metcalfe*, 75 Ala. 42; *Pickett v. Wiota Sch. Dist.*, 25 Wis. 551.

³ *McMullen v. Hoffman*, 174 U. S. 639, 43 L. Ed. 1117, aff'g 83 Fed. 372, 45 L. R. A. 410; *Atcheson v. Mallon*, 43 N. Y. 147; *Colusa County v. Welch*, 122 Cal. 428, 55 Pac. 243.

⁴ *Crocker v. U. S.*, 240 U. S. 74, 60 L. Ed. 533, aff'g 49 Ct. Cl. 85; *Critchfield v. Bermudez A. P. Co.*, 174 Ill. 466, 51 N. E. 552; *Denison v. Crawford County*, 48 Iowa, 211; *State v. Cross*, 38 Kan. 696, 17 Pac. 190.

declaratory thereof.¹ Contracts tending to stifle and lessen competition in bidding for public work, secret agreements to combine interests and conceal it from the public, and to submit simulated bids are illegal, against public policy and will not be enforced to aid any party to such a contract.² Contracts to influence public officials by donation of a site for public buildings are against public policy and cannot be enforced.³ But where a public institution must be located or a structure built, private contributions on condition that a particular location is selected are not against public policy.⁴ If a contract offends against public morals, the courts will not enforce it wherever made for a contract which is illegal is illegal and void everywhere. Again, courts will refuse to regard the law of the place of contract, if it be immoral or unjust, or if it harms the citizens of the State where enforcement is sought, or impairs its own authority or the rights of its citizens.⁵

§ 101. Contracts against Public Policy—Fees of Public Officers.

Where a statute forbids a person to ask or receive compensation for services in an official capacity greater than prescribed by law, an agreement to pay such extra compensation creates no binding obligation.⁶ An agreement

¹Smith v. Albany, 61 N. Y. 444; Seaman v. New York, 172 App. Div. 740, 225 N. Y. 648; Klemm v. Newark, 61 N. J. L. 112, 38 Atl. 692.

²McMullen v. Hoffman, *supra*; Richardson v. Crandall, 48 N. Y. 348; Acheson v. Mallon, 43 N. Y. 147.

³Edwards v. Goldsboro, 141 N. C. 60 53 S. E. 652. See §§ 20-21, *ante*.

⁴Currier v. U. S., 184 Fed. 700; Island County v. Babcock, 17 Wash. 438, 50 Pac. 54; State v. Elting, 29 Kan. 397; Pepin County v. Prindle, 61 Wis. 301, 21 N. W. 254; Wisner v. McBride, 49 Iowa, 220; State v. Johnson, 52 Ind. 197; George v. Harris, 4 N. H. 533, 17 Am. Dec. 446; Davis v. Choctaw County, 58 Okla. 77, 158 Pac. 294.

⁵West Cambridge v. Lexington, 18 Mass. 506; Oscanyan v. Winchester Arms Co., 103 U. S. 261, 26 L. Ed. 539, aff'g 15 Blatch. 79.

⁶Wadsworth v. Bd. of Supervisors, 217 N. Y. 484, 499, 112 N. E. 161;

for the payment of a less sum for any public service by an official than the fee fixed by statute is void for the same reason that it is against public policy.¹

In like manner the promise of a candidate for public office that if elected he would pay all fees into the treasury of the public body and accept a salary is illegal and cannot be enforced. The fees or salary of a public officer as fixed by law are an incident of the office and it is contrary to public policy for candidates to attempt to attain office by promises to perform the duties for any other compensation except that fixed by law, and such promise cannot be enforced;² nor can estoppel be urged against his claim for the compensation fixed by statute because of his public promises to take less.³ Nor will acceptance of a less amount prevent recovery of unpaid arrears.⁴ The giving of contingent fees or compensation for services rendered to the public is contrary to public policy. A contract by tax commissioners whose duties and salary are fixed by statute to pay a firm of attorneys for advice and counsel rendered to them to enable them to learn of and place upon the tax list certain lands omitted is against the public policy of this country which does not permit any system of farming out the collection of public revenues.⁵

McCook County v. Burstad, 30 S. D. 266, 138 N. W. 303; *Rochester v. Campbell*, 184 Ind. 421, 111 N. E. 420.

¹ *Wolf v. Humboldt County*, 36 Nev. 26, 131 Pac. 964; *Russell v. Cordwent*, 152 S. W. (Tex.) 239.

² *Galpin v. Chicago*, 269 Ill. 27, 109 N. E. 713; *Abbott v. Hayes County*, 78 Neb. 729, 111 N. W. 780; *People ex rel. Satterlee v. Bd. of Police*, 75 N. Y. 38.

³ *Galpin v. Chicago*, *supra*; *Grant v. Rochester*, 79 N. Y. App. Div. 460, 175 N. Y. 473; *Moore v. Bd. of Education*, 121 N. Y. App. Div. 862, 195 N. Y. 601, 614, 88 N. E. 645, 89 N. E. 1105.

⁴ *Pitt v. Bd. of Education*, 216 N. Y. 304, 110 N. E. 612.

⁵ *Platte County v. Gerrard*, 12 Neb. 244, 11 N. W. 298.

CHAPTER XVII

WHEN PUBLIC CONTRACT IMPLIED

§ 102. Implied Contracts—When Liability upon Implied Obligation Will Arise.

A public corporation having the legal power to contract may be bound by an implied contract in the same manner as a natural person.¹ Public bodies are liable upon unauthorized contracts which are not illegal where there has been performance and the benefits of such are retained by the public body. But the suit in such cases is not upon the contract but upon quantum valebat.² An implied contract may be proved by circumstances, acts and conduct and sayings of public officers having authority to bind the corporation.³

Public bodies may be bound the same as individuals upon implied contracts made by its agents and to be deduced from corporate acts even without a vote of the governing body, provided the contract is one which is within the scope of its corporate powers and is not one which by charter or statute must be made in a particular

¹ *Harlem G. L. Co. v. Mayor*, 33 N. Y. 309; *Re Dugro*, 50 N. Y. 513; *Nelson v. Mayor*, 63 N. Y. 535; *Baird v. Mayor*, 96 N. Y. 567; *Moore v. Mayor*, 73 N. Y. 238, 29 Am. R. 134; *Pt. Jervis W. Co. v. Pt. Jervis*, 151 N. Y. 111, 45 N. E. 388; *Kramrath v. Albany*, 127 N. Y. 575, 28 N. E. 400; *Marsh v. Fulton County*, 10 Wall. (U. S.) 676, 19 L. Ed. 1040; *Argenti v. San Francisco*, 16 Cal. 256; *Brush-Elec. L. Co. v. Montgomery*, 114 Ala. 433, 21 So. 960; *Taylor v. Lambertville*, 43 N. J. Eq. 107.

² *St. Louis Hay Co. v. U. S.*, 191 U. S. 159, 48 L. Ed. 130, aff'g 37 Ct. Cl. 281; *Clark v. U. S.*, 95 U. S. 539, 24 L. Ed. 518.

³ *Hardwick Town Dist. v. Wolcott*, 78 Vt. 23, 61 Atl. 471; *Maher v. Chicago*, 38 Ill. 266.

way or manner.¹ As pointed out if the act is ultra vires because illegal, it is void and there can be no ratification, as, for instance, where the manner of contracting is limited by statute. In these cases no implied contract can arise. But this does not prevent public bodies from being liable upon quantum meruit, when they have enjoyed the benefit of work performed or goods purchased, when no statute forbids or limits the power to contract therefor.²

§ 103. Taking or Using Property in Performance of Duty but Against Will of Owner.

Often a public body is authorized by express statute to carry out some public enterprise, in the maintenance and establishment of which, and as a necessary incident to which it has the power to designate and procure a location. If in the exercise of that implied power it takes the property of an individual, not by agreement, but against his will, the public body is bound to pay for the use of property which it is thus authorized to take upon an implied contract to pay what it is reasonably worth, or an action may be maintained upon the duty of the public body to make compensation for property taken by its officers against the will of its owners. Both actions have their foundation in the obligation to do justice, which rests upon public bodies in like degree as upon other persons.³ The statutes relating to awards of contracts to the lowest bidder upon competitive bidding or requiring a prior appropriation can have no application to a situation of this character.⁴

¹ *Kramrath v. Albany*, 127 N. Y. 575, 28 N. E. 400; *Peterson v. Mayor*, 17 N. Y. 449; *Nelson v. Mayor*, 63 N. Y. 535.

² *Kramrath v. Albany*, *supra*.

³ *Poillon v. Brooklyn*, 101 N. Y. 132, 4 N. E. 191.

⁴ *Poillon v. Brooklyn*, *supra*.

§ 104. **Where Money is Received or Property Appropriated.**

Implied contracts arise in those cases where money or other property of a party is received by a public body under such circumstances that the general law independent of the express contract, imposes the obligation upon the public body to do justice with respect to the same.¹ It is a rule of the common law that an action lies for money paid by mistake, or upon a consideration which happens to fail, or for money obtained through imposition. This arises as above stated from the obligation to do justice which rests upon all persons, natural or artificial. So where a public body obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation.² Accordingly where a public body obtains money by the sale of bonds which are invalid and deceived the purchaser, by pretending false dates upon the bonds were in fact true, an implied contract to repay the money arises.³ It requires neither argument nor authority to support this proposition that where the money or property of an innocent person has gone into the treasury of any public body whether it be the nation, the State or their subdivisions or territories, by means of a fraud to which its agent is a party, such money or property cannot be held by such public body against the claim of the wronged and injured party.⁴ An agent is not an agent for such a purpose, his doings are vitiated by dishonesty and confer no rights on his

¹ *Ward v. Kropf*, 207 N. Y. 467, 101 N. E. 469; *Argenti v. San Francisco*, 16 Cal. 256.

² *Louisiana v. Wood*, 102 U. S. 294, 26 L. Ed. 153; *Marsh v. Fulton County*, 10 Wall. (U. S.) 676, 19 L. Ed. 1040.

³ *Louisiana v. Wood*, *supra*.

⁴ *U. S. v. State Nat. Bank*, 96 U. S. 30, 24 L. Ed. 647, *aff'g* 10 Ct. Cl. 519.

principal.¹ The law creates an exception to the general rule stated, where the promise is for money received or property appropriated, and if the express promise is not enforceable an implied obligation for the money or the value of the property springs into existence.²

§ 105. When Obligation Arises for Money Had and Received—Trust Liability.

Where a public body receives materials without authority under a void contract and uses them, and obtains their value from property owners by means of assessments, it becomes liable for the actual value of the property or what it obtained therefor, but it will not be concluded, however, by the contract price as the liability arises not upon the contract.³ And a public body will be held liable as trustee where a contractor made a contract with it to remove garbage at a monthly rate and when his work was finished there was paid into the treasury of the public body an unexpended balance more than sufficient to pay his claim, for the reason that in such a situation the fund becomes impressed with a trust which will sustain an action for money had and received to his use.⁴ In similar manner where a health board undertakes without authority to remove certain nuisances and makes a contract therefor without a sufficient appropriation and thereafter the public body levies assessments part of which were paid into its treasury it will be liable in equity to pay this amount to the contractor in an action for money had and received.⁵

¹ U. S. v. State Nat. Bank, *supra*; Long v. Lemoyne Boro., 222 Pa. St. 311, 71 Atl. 211.

² Argenti v. San Francisco, *supra*; Ward v. Kropf, *supra*; see Agawam Nat'l Bank v. South Hadley, 128 Mass. 503.

³ Nelson v. Mayor, 63 N. Y. 535, 544; Argenti v. San Francisco, 16 Cal. 256.

⁴ Swift v. New York, 83 N. Y. 528.

⁵ Parker v. Philadelphia, 92 Pa. St. 401.

§ 106. When Liability Arises—Failure to Comply with Statute.

Where a public body occupies certain property and continues beyond the term, even if the holding over fails to comply with the statutory manner of entering into the contractual relations, if its occupation confers some pecuniary gain, benefit or advantage upon the public body, or is a performance of some public duty enjoined by statute, it is liable upon an implied contract.¹

§ 107. Emergency Contracts.

Contingencies may arise in the administration of city affairs where a thing of absolute necessity is required to be furnished and is furnished at a reasonable price, or where services, materials and property may be immediately needed and where competitive offers and written contracts would be of no service or impossible of obtainment. In these cases it was never intended that the statutes requiring competition, or writing, would have application. Where officers acting in entire good faith to meet the public needs, deem themselves wanting in power, under a mistake of law, or in opportunity because of the emergency, they may incur binding obligations within the corporate purposes of the public body. Where a public body has the legal power to contract for a thing under such circumstances, it may become liable upon an implied obligation for the services, materials or property thus obtained.² But the emergency must be a real emergency which is a sudden and unexpected occurrence or condition calling for

¹ *Commercial Wharf Corp. v. Boston*, 208 Mass. 482, 94 N. E. 805; *Dickinson v. Boston*, 188 Mass. 595, 75 N. E. 68; *Douglas v. Lowell*, 194 Mass. 268, 80 N. E. 510; *Witt v. Mayor*, 6 Robt. 441.

² *Harlem G. L. Co. v. Mayor of New York*, 33 N. Y. 309; *North River Elec. L. Co. v. New York*, 48 N. Y. App. Div. 14. See *Brooklyn City R. Co. v. Whalen*, 191 N. Y. App. Div. 737, 229 N. Y. 570, 128 N. E. 215.

immediate action.¹ The furnishing of light for city streets to prevent a city from being plunged in darkness is such an emergency.² But permanent inadequacy of street railroad service is not such an emergency, and will not justify a city in embarking in the business of operating stage lines.³

Where a city fails to insert the amount of a contract in the tax levy for a current year but water has been furnished under circumstances which imply a contract, and under a statute authorizing the authorities to obtain a water supply it has been declared that such contract was an exception to the rule requiring its amount to be inserted in the tax levy and that the city would be liable to pay what the commodity was fairly and reasonably worth during the period.⁴

When, however, these various statutes which require a prior appropriation, provision for the contract compensation in a tax levy, an award to the lowest bidder upon competition, approval by the voters or by a certain number of taxpayers in a locality or that the contract to be enforceable shall be in writing, have application, they must be fully complied with and public bodies are not liable upon an implied contract made in violation of such charter or statutory requirements.⁵ An exception to the rule exists in the cases of money received or property appropriated.⁶ Where a public body obtains property

¹ Brooklyn City R. Co. v. Whalen, *supra*.

² North River Elec. Co. v. New York, *supra*.

³ Brooklyn City R. Co. v. Whalen, *supra*.

⁴ Pt. Jervis Water Co. v. Pt. Jervis, 151 N. Y. 111, 45 N. E. 388.

⁵ McDonald v. Mayor, 68 N. Y. 23; Hart v. New York, 201 N. Y. 45, 94 N. E. 219; Wadsworth v. Bd. of Super's Livingston County, 217 N. Y. 484, 112 N. E. 161; Ft. Edward v. Fish, 156 N. Y. 363, 50 N. E. 973.

⁶ Louisiana v. Wood, 102 U. S. 294, 26 L. Ed. 153; Lincoln Land Co. v. Vil. of Grant, 57 Neb. 70, 77 N. W. 349; Higgins v. San Diego, 118 Cal. 524, 45 Pac. 824.

under a void contract and actually uses it and collects from property owners its value through assessments, the obligation to do justice which rests alike on public bodies as on natural persons imposes the duty to make compensation for the value of such property to the person from whom it was obtained. The public body in such cases is liable only for the actual value of the property or what it obtained for it and is not concluded by the contract price.¹

§ 108. When Liability upon Implied Obligation will not Arise.

An implied contract will not arise where an express contract is forbidden by law. It stands to reason that if there is no power to make an express contract, an implied contract cannot arise against the express prohibition of the law.² Where a particular manner is prescribed to make a contract, a contract which does not follow that manner cannot be enforced upon the basis of an implied liability.³ In similar manner if work or services or supplies are ordered by an officer or agent of a municipality or the head of a department or board or committee of the State or nation who is unauthorized to make a contract, no implied obligation arises.⁴ Where a statute exists to prevent the

¹ *Nelson v. New York*, 63 N. Y. 535, 544; *Argenti v. San Francisco*, 16 Cal. 256; *Bluthenthal v. Town of Headland*, 132 Ala. 249, 31 So. 87.

² *McDonald v. Mayor*, 68 N. Y. 23; *Parr v. Greenbush*, 72 N. Y. 463; *Dickinson v. Poughkeepsie*, 75 N. Y. 65; *Berka v. Woodward*, 125 Cal. 119, 57 Pac. 777; *Niles Water Wks. Co. v. Niles*, 59 Mich. 311, 26 N. W. 525; *Citizens' Bk. v. City of Spencer*, 126 Iowa, 101, 101 N. W. 643; *Schumm v. Seymour*, 24 N. J. Eq. 143; *Boston Co. v. Cambridge*, 163 Mass. 64, 39 N. E. 787.

³ *In re Niland*, 193 N. Y. 180, 85 N. E. 1012; *Medina v. Dingleline*, 211 N. Y. 24, 104 N. E. 1118; *Vito v. Sinsbury*, 87 Conn. 261, 87 Atl. 722; *City of Wellston v. Morgan*, 65 Ohio St. 219; *Newbery v. Fox*, 37 Minn. 141, 33 N. W. 333; *Fiske v. Worcester*, 219 Mass. 428, 106 N. E. 1025.

⁴ *Bartlett v. Lowell*, 201 Mass., 151, 87 N. E. 195; *Floyd County v. Owego Bridge Co.*, 143 Ky. 693, 137 S. W. 237; *New Jersey Car. Spring Co. v. Jersey City*, 64 N. J. L. 544, 46 Atl. 649.

making of certain contracts and its terms are disregarded in the making of the contract, the contractor cannot recover for supplies furnished under such contract upon an implied promise.¹ The reason for these rules is stated thus: the law never implies a promise to pay unless some duty creates such an obligation and it never implies a promise to do an act contrary to duty or contrary to law. Assumpsit may properly be maintained against public bodies in certain circumstances upon an implied promise, but a promise to pay can never be implied in circumstances where the public body possesses no power to contract.²

Where charter or statute prohibits contracts except in the manner there prescribed, or under defined conditions and circumstances, no implied contract can arise for work done or materials furnished in violation of or without complying with such requirements.³ This is true even though the work has been done and the public body has received the benefits.⁴ In some jurisdictions, however, it has been announced that where the public body has received the benefits of an executed contract, the law implies a promise to pay for what it enjoys provided it had the power to contract therefor, although the manner prescribed or the exact powers were not followed.⁵ When statutes forbid the making of contracts between public bodies and officials of that body, and whether a statute exists or not, for the rule is a rule of the

¹ *Edison Elec. Co. v. Pasadena*, 178 Fed. 425; *Salt Creek Tp. v. King Iron B. & M. Co.*, 51 Kan. 520, 33 Pac. 303; *Perry Water Co. v. Perry*, 29 Okla. 593, 120 Pac. 582.

² *Burrill v. Boston*, 2 Clifford C. C. 590, 596, 4 Fed. Cas. 826; *Bryan v. Page*, 51 Tex. 532, 32 Am. Rep. 637; *Buchanan v. Litchfield*, 102 U. S. 278; *Berlin Iron B. Co. v. San Antonio*, 62 Fed. 882.

³ *Hart v. New York*, 201 N. Y. 45, 94 N. E. 219; *Donovan v. Mayor*, 33 N. Y. 291.

⁴ *Buchanan v. Litchfield*, 102 U. S. 293, and cases cited, *ante*.

⁵ *Maher v. Chicago*, 38 Ill. 266; *East St. Louis v. East St. Louis G. L. & C. Co.*, 98 Ill. 415.

common law, of which these statutes are in most instances merely declaratory, no contract can be implied contrary to the statute or to the common-law rule. Accordingly no contract will be implied to pay a pound master who furnishes his own premises to be used as a pound.¹ It has been declared, however, that an implied contract will arise unless it would be against public policy.² But a mere irregularity in the exercise of the general powers of the governing body of a municipal corporation will not operate to defeat an implied contract where the municipality receives the fruits of the contract. This is for the reason that acts of the general governing body of a municipality within its general powers which are published and represented as valid, with invitations to individuals to enter into engagements and expend money and labor on the faith of them, may be assumed by those dealing with the municipal authorities to be as represented, and where the public body receives the benefits of the contract entered into on the faith of such representations it is estopped from setting up any irregularity not of substance of power or jurisdictional in character.³

But public bodies are not liable under a void contract to pay even quantum meruit for the materials used.⁴ While the principles of estoppel underlie many of the decisions affecting situations above referred to where an implied obligation has been raised,⁵ public bodies are not pre-

¹ *Macy v. Duluth*, 68 Minn. 452, 71 N. W. 687. See *Seaman v. New York*, 172 N. Y. App. Div. 740, 225 N. Y. 648.

² *Call Pub. Co. v. Lincoln*, 29 Neb. 149, 45 N. W. 245.

³ *Moore v. New York*, 73 N. Y. 238, 29 Am. R. 134; *Brady v. New York*, 20 N. Y. 312; *Marion W. Co. v. Marion*, 121 Iowa, 306, 96 N. W. 883; *State Board v. Cits. St. R. Co.*, 47 Ind. 407; *Laird Norton Yards v. Rochester*, 117 Minn. 114, 134 N. W. 644.

⁴ *Bartlett v. Lowell*, 201 Mass. 151, 87 N. E. 195; *Bigler v. New York*, 5 Abb. N. C. 51; *Donovan v. New York*, 33 N. Y. 291; *Keane v. New York*, 88 N. Y. App. Div. 542; *Worell Mfg. Co. v. Ashland*, 159 Ky. 656, 167 S. W. 922.

⁵ *Chicago v. Sexton*, 115 Ill. 230, 2 N. E. 263; *London & N. Y. Land Co. v. Jellicoe*, 52 S. W. (Tenn.) 995.

cluded from setting up the defense of *ultra vires* in these cases where, as shown, an implied contract is not permitted.¹ Other cases admit of recovery on the theory of unjust enrichment. If complete performance is prevented by law, a recovery is allowed for benefits conferred by part performance upon the principle of the maxim that no one shall be made rich by making another poor. The recovery in such cases is not upon a contract which is invalidated but upon an implied agreement, founded upon a moral obligation to account for moneys or property received, which arises by virtue of a new and quasi contractual relation.² If in making a contract the provisions of the charter are not complied with, and the contract thereby proved void, yet where the public body obtained the use of an asphalt plant under the contract to repair its streets, it will be liable for the reasonable value of the use of the plant for the period of such repairs.³

§ 109. When Contract not Implied—Taking Property under Claim of Right.

Where the public body takes property not in the exercise of the power of eminent domain and not under a concession of ownership in an individual, it is not liable to pay therefor upon an implied contract, as its action precludes the implication of a promise to pay. It is liable if at all in tort.

It is only where in the exercise of its governmental power it takes property, the ownership of which it concedes to be in an individual that it is liable upon an implied

¹ *Wheeler v. Poplar Bluff*, 149 Mo. 36, 49 S. W. 1088; *Ft. Scott v. Eads Brokerage Co.*, 117 Fed. 51.

² *Ward v. Kropf*, 207 N. Y. 467, 101 N. E. 469; *First Nat. Bk. v. Goodhue*, 120 Minn. 362, 139 N. W. 599.

³ *Nebraska Bitulithic Co. v. Omaha*, 84 Neb. 375, 121 N. W. 443.

promise to pay.¹ The public body, where it is the national government, may not be sued without its consent for torts. It is liable, however, for the use of patented articles with the consent of the owner of the patent, upon an implied obligation.²

§ 110. Use and Occupation of Private Property—Adoption of Tortious Acts of Agents.

If a municipality undertakes to use property of an individual which it has no power or authority to use, it cannot be held liable upon an implied contract for use and occupation. And even if the acts constitute a trespass the ordinary right to waive the tort and sue upon an implied contract will not arise against a municipality or other public body, as such rule has no application in the case of such public bodies since their powers are limited and they cannot exercise powers which have not been expressly granted or those which are necessary incidents to the powers granted.³ If a public body, without knowledge through its public officers that a well was located upon private property, paid a plumber for connecting its water mains with such well, this is not a ratification sufficient to

¹ *Tempel v. U. S.*, 248 U. S. 121, 63 L. Ed. 162; *U. S. v. Great Falls Mfg. Co.*, 112 U. S. 645, 28 L. Ed. 846, aff'g 16 Ct. Cl. 160; *U. S. v. Cress*, 243 U. S. 316, 61 L. Ed. 746; *U. S. v. Lynah*, 188 U. S. 445, 47 L. Ed. 539; *U. S. v. Buffalo Pitts. Co.*, 234 U. S. 228, 58 L. Ed. 1290, aff'g 193 Fed. 905; *Peabody v. U. S.*, 231 U. S. 530, 58 L. Ed. 351, aff'g 46 Ct. Cl. 39; *U. S. v. Palmer*, 128 U. S. 262, 32 L. Ed. 442, aff'g 20 Ct. Cl. 432.

² See *Farnham v. U. S.*, 210 U. S. 537, 60 L. Ed. 786; *Cramp & Sons Ship Co. v. Curtis Turbine Co.*, 246 U. S. 28, 62 L. Ed. 560; *Marconi Wireless Co. v. Simon*, 246 U. S. 46, 62 L. Ed. 568.

³ *Wilson v. Mitchell*, 17 S. D. 515, 97 N. W. 741; *Rowland v. Gallatin*, 75 Mo. 131, 42 Am. Rep. 395; *Bigby v. U. S.*, 188 U. S. 400, 409, 47 L. Ed. 519, aff'g 103 Fed. 597. See *Smith v. Rochester*, 76 N. Y. 506; *Ft. Edward v. Fish*, 156 N. Y. 363, 50 N. E. 973; *Morrison v. Lawrence*, 98 Mass. 219; *Cavanagh v. Boston*, 139 Mass. 426, 1 N. E. 834, 52 Am. Rep. 716; *Seele v. Deering*, 79 Me. 313, 10 Atl. 45. And see *Fountain v. Sacramento*, 1 Cal. App. 461, 82 Pac. 637.

make it liable for water used from the well.¹ Nor does the employment of an attorney by the governing body of a municipality to defend a policeman for an assault amount to an adoption of his conduct so as to make the municipality liable for the damages recovered against the officer.² A municipality is liable as a hold-over lessee on an implied contract for use and occupation of realty.³ And it is liable to pay the reasonable value of the use of a private dwelling for pest-house purposes even though it get possession through a trick or trespass as long as its charter authorizes it to keep a pest house or hospital.⁴ The mere fact that a tort accompanies its act will not change the act if it be sufficient to imply a contract for an authorized purpose.⁵

§ 111. Volunteer.

Where services are rendered without any request from the public body therefor, and even with the knowledge of its officers, even though the public body is benefited thereby, it cannot be made liable as no implied contract can arise from the rendition of purely voluntary services.⁶ It is in like manner an elementary principle in an action to recover back moneys paid and expended by one for another, that money voluntarily paid cannot be recovered back. In order to support such an action it is essential that a request, on the part of the one benefited, to make such payment, either expressly or by fair implication from

¹ *Wilson v. Mitchell*, *supra*.

² *Buttrick v. Lowell*, 83 Mass. (1 Allen) 172.

³ *Witt v. New York*, 6 Robt. 441; *Commercial W. Co. v. Boston*, 208 Mass. 482, 94 N. E. 805.

⁴ *Bodewig v. Pt. Huron*, 141 Mich. 564, 104 N. W. 769.

⁵ *Idem*.

⁶ *Holmes v. Kansas City*, 81 Mo. 137; *Woods v. Ayres*, 39 Mich. 345; *B. l. of Commrs. v. Harrison*, 20 La. Ann. 201; *Baltimore v. Hughes*, 1 Gill. & J. (Md.) 480, 19 Am. Dec. 243; *Coleman v. U. S.*, 152 U. S. 96, 38 L. Ed. 368; *Boston v. Dist. of Columbia*, 19 Ct. Cl. 31; *Barnert v. Paterson*, 48 N. J. L. 395, 6 Atl. 15.

the circumstances, be proved.¹ The claim that a party was requested to act is not the subject of a presumption but is a substantive fact which must be proved since it lies at the very foundation of the claimed right of recovery.² Moneys, given voluntarily to aid and assist a person without expectation of reimbursement, are accordingly not recoverable back.³

The mere acceptance and use of property is insufficient, therefore, to create an implied liability on the part of the public body to pay for it.⁴ And similarly a voluntary performance of work, labor or services will not give rise to a promise to pay upon an implied contract,⁵ unless such services or the use of the property be ratified through acceptance of such by persons authorized.⁶ No person can make himself the creditor of a public body by voluntarily discharging a duty which belongs to that other.⁷ Upon this principle it has been declared that acceptance and use with knowledge of the governing body of a municipi-

¹ *Albany v. McNamara*, 117 N. Y. 168, 172, 22 N. E. 931.

² *Albany v. McNamara*, *supra*; *People v. Brooklyn*, 21 Barb. 484; *U. S. v. Ross*, 92 U. S. 281, 23 L. Ed. 707.

³ *Deer Isle v. Eaton*, 12 Mass. 328; *Medford v. Learned*, 16 Mass. 215; *Albany v. McNamara*, *supra*.

⁴ *Alton v. Mulledy*, 21 Ill. 76; *Jeffersonville v. Louisville & J. S. F. Co.*, 27 Ind. 100, 89 Am. D. 495; *New Jersey Car. Spring Co. v. Jersey City*, 64 N. J. L. 544, 46 Atl. 649; *Salsbury v. Philadelphia*, 44 Pa. St. 303; *Siebrecht v. New Orleans*, 12 La. Ann. 491; *Forehand v. U. S.*, 23 Ct. Cl. 477; *Duloff v. Ayer*, 162 Mass. 569, 39 N. E. 191; *Boston Elec. Co. v. Cambridge*, 163 Mass. 64, 39 N. E. 787; *Virginia City G. Co. v. Virginia City*, 3 Nev. 320.

⁵ *Jeffersonville v. Steam Ferryboat*, 35 Ind. 19; *Baltimore v. Poultney*, 25 Md. 18; *Haughwout v. Mayor of N. Y.*, 2 Keyes, 419; *Lydecker v. Nyack*, 6 N. Y. App. Div. 90; *Doloff v. Ayer*, 162 Mass. 569, 39 N. E. 191.

⁶ *Boston Elec. Co. v. Cambridge*, *supra*; *Harrison County v. Bline*, 34 Ind. App. 352, 72 N. E. 1034; *Morgan County v. Seaton*, 122 Ind. 521, 24 N. E. 213; *Huntington County v. Boyle*, 9 Ind. 296; *Moon v. Howard County*, 97 Ind. 176; *Fouke v. Jackson County*, 84 Iowa, 616, 51 N. W. 71; *Cleveland County v. Seawell*, 3 Okla. 281, 41 Pac. 592; *Ostendorff v. Charleston Co.*, 14 S. C. 403.

⁷ *Salsbury v. Philadelphia*, *supra*; *Alton v. Mulledy*, *supra*; *Barnert v. Paterson*, 48 N. J. L. 395, 6 Atl. 15.

pality will not suffice to create an implied contract.¹ The contrary has, however, been declared and municipalities have been made to pay for gas furnished with knowledge of its governing body.² But acceptance and use without the knowledge of the governing body cannot be made the foundation of an implied obligation.³ It is said that the only safe rule is to hold public bodies not bound unless there is an authorization expressed by a resolution of the council, and so where furnishings were delivered for a court room upon the order of judicial authorities without sanction or knowledge of the council and were worn out before the bill was presented, there could be no implied contract to pay for them.⁴ By a parity of reasoning it was declared that where fire hose the property of a resident was used by a municipal fire department by mistake, because intermixed with hose belonging to the town, and its use was under a belief that it belonged to the town no implied contract to pay for it or its use arises.⁵

Where, however, an officer is required by law to perform a duty involving the disbursement of money out of his own pocket, the law will not consider him a volunteer, but will require his reimbursement.⁶ And where the law imposes an obligation upon a public body which it refuses to perform, while one volunteering to perform may not become a creditor, nevertheless it may be held liable upon an implied contract at the suit of one who suffers damage in consequence of its refusal to perform such duty.⁷

¹ *New Jersey Car Spring Co. v. Jersey City*, 64 N. J. L. 544, 46 Atl. 649.

² *San Francisco Gas Co. v. San Francisco*, 9 Cal. 453.

³ *Seibrecht v. New Orleans*, 12 La. Ann. 496.

⁴ *Idem*.

⁵ *Dolloff v. Ayer*, 162 Mass. 569, 39 N. E. 191.

⁶ *Barnert v. Paterson*, *supra*.

⁷ *Seagraves v. Alton*, 13 Ill. 366.

CHAPTER XVIII

LETTING OF PUBLIC CONTRACTS

§ 112. Conditions Precedent.

When a statute confers on a public officer the power to enter into a contract and requires the officer to advertise for bids before making the contract, such advertising is a condition precedent to the grant of authority and without the advertising there is no authority. Hence any contract not made through advertising for bids, when so required, is void.¹ In like manner, the requirement of statutes that there must be a prior appropriation,² a provision in the tax levy,³ approval by the head of department,⁴ or a vote of certain electors, are all conditions precedent to the making of a valid contract where they are required by statute. The making of definite plans and specifications,⁵ of a contract in writing⁶ and the opening of bids in the presence of named officials are likewise conditions precedent which must be fulfilled before an enforceable contract can result.⁷ These various provisions of law are not merely permissive but mandatory.

§ 113. Necessity for Plans and Specifications.

Most public contracts are awarded to contractors for

¹ *Hartford v. Hartford Elec. L. Co.*, 65 Conn. 324, 32 Atl. 925; *Schumm v. Seymour*, 24 N. J. Eq. 153.

² See cases, §§ 145 and 146, *post*.

³ *Pt. Jervis W. Co. v. Pt. Jervis*, 151 N. Y. 111, 45 N. E. 388.

⁴ See § 130, *post*, and cases.

⁵ *Hart v. New York*, 201 N. Y. 45, 94 N. E. 219.

⁶ *Edge Moor Bridge Works v. Bristol County*, 170 Mass. 528, 49 N. E. 918; *Wellston v. Morgan*, 59 Ohio St. 149, 52 N. E. 127.

⁷ *People ex rel. Rodgers v. Coler*, 35 N. Y. App. Div. 401.

public work after advertisement for proposals or bids to do the work, and the competitive bids thus obtained are the basis of an award to the lowest bidder under statutes existing in most jurisdictions requiring such manner of public letting to be followed. In most jurisdictions there is a maximum amount fixed for letting of contracts without competitive bidding.

Contracts exceeding such amount are invalid unless the manner of letting is substantially followed, as such statutes are considered mandatory. Even where the statutes have not specifically required plans and specifications, the courts have declared that in order to comply with these statutes, it is essential that plans and specifications of reasonable definiteness as to work, which is required to be let by public competitive bidding, should be prepared in advance of the bids. These plans and specifications are absolutely essential to form a basis of competition and they must be of sufficient definiteness to require competition on every material item, and they must state the quantity of work as definitely as practicable.¹

The object of letting public work to the lowest bidder after inviting public bids is to preclude favoritism and jobbing on the part of public officials in whom authority

¹ *Brady v. New York*, 20 N. Y. 316; *Matter of Merriam*, 84 N. Y. 596; *Matter of Rosenbaum*, 119 N. Y. 24, 23 N. E. 172; *Matter of Anderson*, 109 N. Y. 554, 17 N. E. 209; *Hart v. New York*, 201 N. Y. 45, 94 N. E. 219; *Tift v. Buffalo*, 25 App. Div. 376, 164 N. Y. 605, 58 N. E. 1093; *Gage v. New York*, 110 N. Y. App. Div. 403; *Andrews v. Ada County*, 7 Idaho, 453, 63 Pac. 592; *Wells v. Burnham*, 20 Wis. 112; *Ricketson v. Milwaukee*, 105 Wis. 591, 81 N. W. 864; *Coggeshall v. Des Moines*, 78 Iowa, 235, 41 N. W. 617; *Fones Bros. Hdw. Co. v. Erb*, 54 Ark. 645, 17 S. W. 7; *Wilkins v. Detroit*, 46 Mich. 120, 8 N. W. 701; *Mazet v. Pittsburgh*, 137 Pa. 548, 20 Atl. 693; *Little v. Jayne*, 124 Ill. 123, 16 N. E. 374; *Wilson v. Collingswood*, 80 N. J. L. 626, 77 Atl. 1033; *Huntington County v. Pashong*, 41 Ind. App. 69, 83 N. E. 383; *Yaryan v. Toledo*, 28 Ohio C. C. 278, 76 Ohio St. 584, 81 N. E. 1199; *Hannan v. Bd. of Education*, 25 Okla. 372, 107 Pac. 646.

to make contracts is vested and to whom the supervision of the execution of contracts is intrusted.¹

To permit each bidder to propose his plans and specifications not only prevents competition but opens the door to favoritism, and wipes out the standard by which the public body may determine who is the lowest bidder.² The omission in proposals, therefore, to provide sufficiently definite specifications which are furnished to the bidder, or to require the bidder, where the statute does not prohibit it, to furnish definite specifications to accompany his bid, is not a mere irregularity but is a direct violation of such statute, and although the work under a contract has been performed and the public body has the benefit of it, there can be no recovery upon such a contract.³ Where the advertisement states in general terms the character and extent of the work and informs an intending bidder that plans and drawings which are a part of the specifications may be seen at a public office, and he is there shown such plan, he is justified in submitting his bid based upon what he is shown, in the absence of any hint or suggestion that there are other more detailed plans in existence; and when later he is required to perform more costly work in accordance with other plans, he may recover as for a breach of the contract the extra cost.⁴

But where he has had presented to him an agreement which he accepts which is precise and strict in its requirements he cannot claim reliance on plans on file in municipal offices, which accompanied prior grading contracts

¹ *Brady v. New York*, 20 N. Y. 312; *Gage v. New York*, *supra*; *Ertle v. Leary*, 114 Cal. 238, 46 Pac. 1; *Packard v. Hayes*, 94 Md. 233, 51 Atl. 32.

² *Hart v. New York*, 201 N. Y. 45, 94 N. E. 219; *Ertle v. Leary*, *supra*.

³ *Hart v. New York*, *supra*.

⁴ *Beckwith v. New York*, 148 N. Y. App. Div. 658, 210 N. Y. 530, 103 N. E. 1121.

affecting the same roadways, for these constitute no representation to bidders upon the proposals for contracts as to any fact and are not in their nature a warranty.¹ While the manner of letting public contracts provided by statute is the measure of power and controls the conduct of public officials, it nevertheless does not deprive him of the exercise of reasonable discretion and care in the public interest. Public officials have the power, therefore, to insert in the proposals provisions intended to exclude irresponsible bidders from competition. Conditions precedent to considering proposals may properly be included in the specifications, which will require prospective bidders to give proof of their capacity to furnish the necessary materials, plant and means to complete the work. They may also be required to furnish satisfactory evidence that they have installed the type of work or materials required in the contract.² These provisions are inserted for the benefit of the city and not for other or higher bidders and may not be taken advantage of by them.³ Proposals and plans, and specifications accompanying them, if so ambiguous as to prevent fair competition among bidders, cannot result in a valid contract.⁴ Nor may they be indefinite in amount, for if this were permitted an advertisement for a small amount of work, so small as not to induce bidders to assemble a plant and organization, might be let at an extravagant price and subsequently enormously enlarged in the discretion of some public officer.⁵ Where no plans

¹ *Dunn v. New York*, 205 N. Y. 342, 98 N. E. 495.

² *Nathan v. O'Brien*, 117 N. Y. App. Div. 664; *Knowles v. New York*, 37 Misc. 195, 176 N. Y. 430, 68 N. E. 860.

³ *Nathan v. O'Brien*, *supra*.

⁴ *Gage v. New York*, 110 N. Y. App. Div. 403; *Piedmont Pav. Co. v. Allman*, 136 Cal. 88, 68 Pac. 493.

⁵ *Morris & Cummings Dredging Co. v. New York*, 116 N. Y. App. Div. 257, 193 N. Y. 678, 87 N. E. 1123; *Hart v. New York*, 201 N. Y. 45, 94 N. E. 219.

and specifications are submitted with a bid, it is practically impossible for bidders to compete with one another on a common basis of work to be done and materials to be furnished, and the question of determining who is the lowest bidder is left to the discretion and judgment of public officers. Under such conditions, a bid made and contract entered into in response thereto are illegal.¹ A mere summary of the general results to be accomplished by the work cannot furnish a basis for real competitive bids, which may be subjected to an intelligent and uniform test for the purpose of determining which is the lowest.²

So also a proposal which allows a bidder to select out of many methods or systems of accomplishing a work or erecting a plant, the method which the bidder prefers, is invalid. The duty of selection of a type, a system, a method or a plan is upon public officers under these statutes and they must choose out of those which are available the one to be adopted or constructed. The allowing of each bidder to submit his own independent proposition as to anything which would form an important element of the contract violates the statute.³

If the known standard systems for the work in hand involve such radically different theories that bids cannot be based on a common set of specifications, the obligation rests upon the public officers to adopt what seems the most promising system and make appropriate specifications for it or to call for bids on any one of the different systems upon which such bids are to be received. If the

¹ *Hart v. New York*, *supra*; *Packard v. Hayes*, *supra*.

² *Hart v. New York*, *supra*; *Ricketson v. Milwaukee*, 105 Wis. 591, 81 N. W. 864; *Fones Hardware Co. v. Erb*, 54 Ark. 645, 17 S. W. 7; *Ertle v. Leary*, *supra*; *Packard v. Hayes*, *supra*; *Mazet v. Pittsburgh*, 137 Pa. St. 548, 20 Atl. 693; *Bennett v. Emmetsburg*, 138 Iowa, 67, 115 N. W. 582.

³ *Packard v. Hayes*, *supra*.

right is reserved to reject any and all bids, the public authorities may then make a choice and a lawful award.¹ While objection has been made to the latter course as shifting the responsibility of selecting the type or system from the public official to the contractor, the hypothesis outlined seems to exclude that result.² Where a proposed contract authorizes changes in the character of the work and materials which might involve expenditures in excess of the statutory amount fixed for non-competitive letting, and delegates to the engineer the exclusive right to determine the additional amount to be paid, it is invalid, since it confers the exercise of a discretion and power not vested by law in the public officials and violates the statute regulating the manner of letting.³

Where specifications call for alternative kinds of material of greater difference in value and the plans are drawn with dimensions which are sufficient for one kind of material, and the contract is ambiguous as to who shall decide which of the materials shall be used, the contract and specifications are so indefinite that full and free competition which the charter provisions require cannot be had.⁴ Public officials are not restricted in their efforts to obtain the best quality of work and materials for the public body they represent, and accordingly they may limit the kind or quality of materials to be used, as long as they leave the purchaser free to procure it in the open market and do not limit him by fixing a price or otherwise. Where the product of a particular manufacturer is of a generally recognized excellence, public officials who are required by statute to award contracts to the lowest bidder may, like

¹ *Hart v. New York*, *supra*; *Baltimore v. Flack*, 104 Md. 107, 64 Atl. 702.

² *Hart v. New York*, *supra*.

³ *Gage v. New York*, 110 N. Y. App. Div. 403.

⁴ *Idem*.

private individuals, call for it in proposals for bids in preference to similar products.¹ But they have no right to fix a price in the advertisement for a portion of the work.² Fixing a price for earth excavation as a stated proportion of the price to be given by the bidder for rock excavation is not an interference with fair competition.³ Specifications which state the quality of materials required but not the quantities are invalid as there can be no competitive bidding in a contract of that description, for unless quantities are stated there can be no comparison of bids.⁴ If from the facts and data given all bidders are enabled to know by computation what material would be needed and the quantities, the specifications are valid.⁵ But where bids are called for under conditions which are calculated to practically exclude competition, the contract will not be upheld.⁶ Where a public body fails to provide specifications which are sufficiently definite to enable a contractor to complete his work, unless he is given full discretion in this regard, it is unreasonable to require him to take daily instructions and he is entitled to additional plans before he can be required to proceed with the work.⁷ Bids may call for the use of alternative materials where the interests of the public body are fully protected.⁸ And if it is im-

¹ *Knowles v. New York*, 37 Misc. 195, 176 N. Y. 430, 68 N. E. 860.

² *Matter of Manhattan Sav. Inst.*, 82 N. Y. 142; *Matter of Merriam*, 84 N. Y. 596; *Re Mahan*, 81 N. Y. 621; *Re Met. G. L. Co.*, 85 N. Y. 526; *Re Pelton*, 85 N. Y. 651; *Re Paine*, 26 Hun, 431, 89 N. Y. 605; *Re Rosenbaum*, 119 N. Y. 24, 23 N. E. 172; *Larned v. Syracuse*, 17 N. Y. App. Div. 19; *Smith v. Syracuse*, 161 N. Y. 484, 55 N. E. 1077.

³ *Matter of Marsh*, 83 N. Y. 431.

⁴ *Bigler v. Mayor*, 5 Abb. N. C. 51, 69.

⁵ *Jenney v. Des Moines*, 103 Iowa, 347, 72 N. W. 550.

⁶ *Kay v. Monroe*, 93 N. Y. App. Div. 484.

⁷ *Delafield v. Westfield*, 41 N. Y. App. Div. 24, 169 N. Y. 582, 62 N. E. 1095.

⁸ *Gilmore v. Utica*, 131 N. Y. 26, 29 N. E. 841; *Schieffelin v. New York*, 65 Misc. 609; *Lentilhon v. New York*, 102 N. Y. App. Div. 548; *Walter v. Mc-*

possible because of the character of the work to determine the amount of work to be done, lump sum bids for all the work or unit prices based upon estimated quantities are permitted.¹ Unbalanced bids which do not materially enhance the aggregate cost of the work are not ground of complaint.²

§ 114. Notice for Proposals and Bids—Necessity of Advertising.

The purpose of the statutes requiring advertising for proposals upon all public work is to create genuine competition in bidding and, therefore, the time during which and the medium in which such advertisement shall appear are material matters which must be strictly complied with to make a valid contract or create a valid assessment. It is essential that bidders, so far as possible, be put upon terms of perfect equality and that they be permitted to bid on substantially the same proposition and upon the same terms. Accordingly, a valid contract in accordance with these statutes can only be made after the public body has advertised for bids and then only upon a bid tendered in response to such advertisement. Every substantial requirement of the statute intended for the protection of the public and property owners must be complied with or the contract will be invalid.³ These statutes are mandatory

Clellan, 113 N. Y. App. Div. 295, 190 N. Y. 505, 83 N. E. 1133; *Connersville v. Merrill*, 14 Ind. App. 303, 42 N. E. 1112; *Barber A. P. Co. v. Gaer*, 115 Ky. 334, 73 S. W. 1106; *Baltimore v. Flack*, 104 Md. 107, 64 Atl. 702; *Detroit v. Hosmer*, 79 Mich. 384, 44 N. W. 622; *Nusff v. Cameron*, 134 Mo. App. 607, 114 S. W. 1125, 117 S. W. 116; *Dixey v. Atlantic City &c. Co.*, 71 N. J. L. 120, 58 Atl. 370.

¹ *O'Brien v. Mayor*, 139 N. Y. 543, 35 N. E. 323; *Walter v. McClellan*, 113 N. Y. App. Div. 295, 190 N. Y. 505, 83 N. E. 1133.

² *Re Anderson*, 109 N. Y. 554, 17 N. E. 209.

³ *Mut. Life Ins. Co. v. Mayor*, 144 N. Y. 494, 39 N. E. 386; *Tift v. Buffalo*, 25 N. Y. App. Div. 376, 164 N. Y. 605, 58 N. E. 1093; *Re Pennie*, 108 N. Y. 364, 15 N. E. 611; *Hart v. New York*, 201 N. Y. 45, 94 N. E. 219; *Hewes v.*

and the evils which they are designed to prevent can only be circumvented by construing these restrictive statutory provisions so as to accomplish the objects intended. The preliminary steps leading up to the contract are conditions precedent to the power of the public body to enter into the contract.¹ Requiring the notice to be published a certain number of weeks in a stated number and class of publications is a requirement and a condition precedent which must be strictly followed.² Provision for publication in five successive numbers of an official paper implies that the plans and specifications referred to in the notice shall be on exhibition during all these days to have proceedings valid.³ The advertisement or notice should itself contain the essential elements required to give due notice of the nature and extent of the work or supplies, the quality and estimated quantities, as near as possible, of the work to be done or supplies to be furnished and the kinds and classes of such work or supplies. It should also state the time within which the work should be done or the supplies delivered, and the location of the work as well as a time and place for the receipt of proposals. If these material matters are not complied with a valid contract cannot be made.⁴ It is unusual to publish the specifications, but they may be sufficiently included in the

Reis, 40 Cal. 255; Fairbanks M. Co. v. North Bend, 68 Neb. 560, 94 N. W. 537; California Imp. Co. v. Moran, 128 Cal. 373, 60 Pac. 969; Duffy v. Saginaw, 106 Mich. 335, 64 N. W. 581; Connersville v. Merrill, 14 Ind. App. 303, 42 N. E. 1112; Oakley v. Atlantic City, 63 N. J. L. 127, 44 Atl. 651.

¹ McCloud v. Columbus, 54 Ohio St. 439, 44 N. E. 95; Hewes v. Reis, *supra*.

² McCloud v. Columbus, *supra*.

³ Tiff v. Buffalo, *supra*.

⁴ Hart v. New York, 201 N. Y. 45, 94 N. E. 219; Polk v. McCartney, 104 Iowa, 567, 73 N. W. 1067; Windsor v. Des Moines, 101 Iowa, 343, 70 N. W. 214; Inge v. Bd. of Public Works, 135 Ala. 187, 33 So. 678; Heidelberg v. St. Francois County, 100 Mo. 69, 12 S. W. 914; Detroit v. Hosmer, 79 Mich. 384, 44 N. W. 622; Pilcher v. English, 133 Ga. 496, 66 S. E. 163; Adams v. Essex County, 205 Mass. 189, 91 N. E. 557.

notice by reference and many of the matters which may ordinarily appear in the notice can be set out in specifications thus made a part of the notice and this will be a sufficient compliance with the statute.¹ But since intelligent bids can only be made after an opportunity of inspecting the plans and specifications and learning precisely what kind of work is required and its details, a reasonable interpretation of the statute requires that these shall be on file before proposals are advertised for so as to give fair chance of competition among all bidders.² Where a contract is advertised to be let at the site of a proposed bridge, letting of it by outcry at a point half a mile from such site is not a compliance with law.³ And additions and alterations to public work need not be advertised for where they are made in good faith, the general plan is not changed and there is no attempt to evade the statute.⁴ If the notice fairly complies with the statute, slight irregularities in the giving of it will be disregarded.⁵ Where the statute specifies no length of time of publication of the notice, the time of advertising must be a reasonable time.⁶ But where the statute does not require that a notice shall be given inviting proposals, this matter becomes one resting in discretion and public officers are not required to

¹ *Swift v. St. Louis*, 180 Mo. 80, 79 S. W. 172; *Dixon v. Greene County*, 76 Miss. 794, 25 So. 665; *Ampt v. Cincinnati*, 17 Ohio C. C. 516, 60 Ohio St. 621, 54 N. E. 1097; *Owens v. Marion*, 127 Iowa, 469, 103 N. W. 381; but see *Wilkins v. Detroit*, 46 Mich. 120, 8 N. W. 701, 9 N. W. 427.

² *Smith v. Syracuse*, 17 N. Y. App. Div. 63, Rev. O. G. 161 N. Y. 484, 55 N. E. 1077.

³ *Sparks v. Jasper County*, 213 Mo. 218, 112 S. W. 265.

⁴ *Escambia County v. Blount Const. Co.*, 66 Fla. 129, 62 So. 650.

⁵ *Potts v. Philadelphia*, 195 Pa. St. 619, 46 Atl. 195; *Ellis v. Witmer*, 134 Cal. 249, 66 Pac. 301; *Belser v. Allman*, 134 Cal. 399, 66 Pac. 492; *Newport News v. Potter*, 122 Fed. 321.

⁶ *Chippewa Bridge Co. v. Durand*, 122 Wis. 85, 99 N. W. 603; *Augusta v. McKibben*, 22 Ky. Law. Rep. 1224, 60 S. W. 291.

give notice but at their option may award a contract without notice.¹

§ 115. Necessity of Advertising—Patented Articles.

Where from a consideration of the object and purpose of these provisions which restrict the letting of public contracts except upon advertisement for proposals and then by award to the lowest bidder, it appears that they can be made to apply only by a disregard of their plain purpose and intent, they become inapplicable.² In the case of desired articles which are patented and which can be obtained from only one person, manifestly to submit the matter to public letting is impossible.³

Recognizing the impossibility of such a situation, even where contracts for the use of patented pavements have been prohibited, the prohibition has been made conditional,—namely, that the purchase of or contract for patented articles shall be under such circumstances that there can be a fair and reasonable opportunity for competition, the conditions for which shall be prescribed by the public body.⁴

Where the scheme devised under such a statute affords the owners of patented and unpatented pavements to join in the bidding on equal terms there is that fair and reasonable opportunity for competition which meets the statute. A contract to lay a smooth and noiseless pavement let under such scheme is a valid contract.⁵ An unpatented

¹ *Crowder v. Sullivan*, 128 Ind. 486, 28 N. E. 94; *Dillingham v. Spartanburg*, 75 S. C. 549, 56 S. E. 381.

² *Baird v. Mayor*, 96 N. Y. 567; *Matter of Dugro*, 50 N. Y. 513; *Yarnold v. Lawrence*, 15 Kan. 103; *Hobart v. Detroit*, 17 Mich. 246; *Contra*, *Dean v. Charlton*, 23 Wis. 590; *Nicholson Co. v. Painter*, 35 Cal. 699.

³ *Baird v. Mayor*, *supra*; *Matter of Dugro*, *supra*; *Yarnold v. Lawrence*, *supra*; *Hobart v. Detroit*, *supra*³ *Contra*, *Dean v. Charlton*, *supra*; *Nicholson Co. v. Painter*, *supra*.

⁴ *Greater N. Y. Charter*, § 1554.

⁵ *Warren Bros. Co. v. New York*, 190 N. Y. 297, 83 N. E. 59. See *Rose v.*

pipe of a type known as a lock bar joint even though made by patented machinery is not within such a statute.¹ Where the advertisement for patented articles presents a fair and reasonable opportunity for competition, the courts cannot interfere with an award.² It has been said that there should be advertising even though patented articles are required.³ But where the contract calls for an exchange of equipment the provision of an ordinance will not apply.⁴

§ 116. Form of Bid.

Public bodies may invite bids in various forms provided each proposal is upon a definite and specific plan, and attended by specifications covering every material detail of the work. These must be free from ambiguity and sufficiently clear to afford bidders an opportunity to compete. This can only be afforded by definite specifications to which all bidders can conform.⁵ Irregularities in the form of the bid may justify rejection by the public authorities, but they may waive regulations made for their protection,⁶ unless such act of waiver will permit the public body to be defrauded or damaged. A bid is not invalid because the bidder or his sureties failed to appear before the notary who took their verification or because of misrepresentations of the sureties as to their qualifications.⁷

Low, 85 N. Y. App. Div. 461; *Barber A. P. Co. v. New York*, 86 *Id.* 617; *Barber A. P. Co. v. Willcox*, 90 *Id.* 245; *Kay v. Monroe*, 93 *Id.* 484.

¹ *Holly v. New York*, 128 N. Y. App. Div. 499.

² *Hastings Pav. Co. v. Cromwell*, 67 Misc. 212.

³ *Newark v. Bonnel*, 57 N. J. L. 424, 31 Atl. 408.

⁴ *Worthington v. Boston*, 152 U. S. 695, 38 L. Ed. 603.

⁵ *Van Reipen v. Jersey City Mayor*, 58 N. J. L. 262, 33 Atl. 740; *Moreland v. Passaic*, 63 N. J. L. 208, 42 Atl. 1058; *Chippewa Bridge Co. v. Durand*, 122 Wis. 85, 99 N. W. 603; *In re Marsh*, 83 N. Y. 431; *Re Clamp*, 33 Misc. 250. Sec. 113, *ante*.

⁶ *McCord v. Lauterbach*, 91 N. Y. App. Div. 315; *Gage v. New York*, 110 N. Y. App. Div. 403.

⁷ *McCord v. Lauterbach*, *supra*.

Invalidity will not arise because the price bid was written over an erasure, without any note of such erasure having been made, as long as it appears by affidavit that the erasure was made before the bid was verified or submitted.¹ It is not invalid because not signed, if the statute only requires verification, and the bid is verified.² Nor is it illegal and invalid because one of the sureties on the bid is a member of the municipal assembly. This makes the bid voidable at the option of the comptroller who may waive irregularities or even illegalities of this kind.³ A blank bid upon which the names of the bidders do not appear is not a bid, and, against strict provisions of law providing how a contract shall be made, cannot be the basis of a valid contract.⁴

§ 117. Deposit of Bids.

A provision of a statute that all bids shall be publicly opened by the officers advertising for the same and in the presence of the comptroller, but that such opening shall not be postponed if the comptroller after notice fails to attend, is mandatory and requires that such opening shall not take place except in the presence of the officers advertising for bids or proposals. These must of necessity be present, while the absence of the comptroller can be excused. Such provisions are salutary in their nature and purpose and are intended to prevent the manipulation of bids before they come into the hands of the officer who is to report them to the comptroller. The public officer advertising may not absent himself from the opening and has no power to waive the requirements of the statute and to make that legal

¹ Matter of Clamp, 33 Misc. 250.

² *Idem.*

³ *Idem.*

⁴ Williams v. Bergin, 129 Cal. 461, 62 Pac. 59.

which the law prohibits. If he is absent the bids are invalid and may not be made the basis of any further proceedings.¹ But where the bids are received, and an adjournment is taken to bring all the officers together, who are charged with the duty of making the examination, and they all do come together and act within a reasonable time, the statute which is merely directory in that respect is satisfied.²

§ 118. Modification of Bid.

A bidder who submits a sealed bid for public work cannot change it after it is opened, nor may the public authorities who receive the bid permit a change in any material respect. To allow such a change after bids are opened violates the purpose and intent of the statutes regulating competitive bidding. It opens the door to favoritism and preference if not to jobbing and gross fraud. The public authorities have power to accept or reject bids as submitted, but they possess no power to permit material changes or amendment to be made in the terms or conditions of the bid.³ Modification of a bid before it is accepted or acted on, but after the time limited for submission of bids, is not permissible for like reasons.⁴ Such a bid can be regarded in no other light than as a new bid, and as one made after all other competitors are led to believe no further bids will be received. Bidders would not be bidding upon equal terms or even upon the same

¹ *People ex rel. Rodgers v. Coler*, 35 N. Y. App. Div. 401.

² *McCord v. Lauterbach*, 91 N. Y. App. Div. 315.

³ *Chicago v. Mohr*, 216 Ill. 320, 74 N. E. 1056; *State v. Bd. of Comm'rs Douglas County*, 11 Neb. 484, 9 N. W. 691; *Beaver v. Trustees*, 19 Ohio St. 97; *Boren v. Comm'rs Darke County*, 21 Ohio St. 311; *Fairbanks, Morse & Co. v. North Bend*, 68 Neb. 560, 94 N. W. 537; *Dickinson v. Poughkeepsie*, 75 N. Y. 65.

⁴ *Fairbanks, Morse & Co. v. North Bend*, *supra*.

proposition if this were allowed.¹ But of course all bidders have the right previous to the opening of sealed proposals to modify their bids by letter or telegram. Before acceptance of his bid there is no valid or binding contract, and so long as there is no valid contract a bidder has the right to change his bid and insist that his bid when opened shall only be considered as modified.² He may do this without sacrificing the deposit which he has been compelled to make as a condition of bidding.³

When a bid is thus modified, it may be accepted as modified and a binding contract will result.

§ 119. Mistake in Bid—Rescission—Relief in Equity.

If a bidder makes an unintentional mistake in his bid, he has a right to withdraw his bid before it is acted on.⁴ And in the event that a bid is accepted and the mistake reveals itself then for the first time, if the bidder calls the attention of the public authorities to the mistake upon its discovery he may be relieved in equity,⁵ or he may set up the facts in defense of an action at law for damages.⁶

Sometimes, as a consequence of the haste in which bids are prepared, errors or omissions inadvertently and unintentionally creep into the bids, and the bidder never con-

¹ *Fairbanks, Morse & Co. v. North Bend*, *supra*; *Dickinson v. Poughkeepsie*, *supra*.

² *Thompson v. U. S.*, 3 Ct. Cl. 433; *North Eastern Cons. Co. v. North Hempstead*, 121 N. Y. App. Div. 187.

³ *North Eastern Cons. Co. v. North Hempstead*, *supra*.

⁴ *Martens & Co., Inc. v. Syracuse*, 183 N. Y. App. Div. 622; *Harper v. Newburgh*, 159 *Id.* 695; *New York v. Dowd Lumber Co.*, 140 *Id.* 358; *Moffett & Co. v. Rochester*, 178 U. S. 373, 44 L. Ed. 1108; *Northeastern Cons. Co. v. North Hempstead*, 121 N. Y. App. Div. 187; *Chicago v. Mohr*, 216 Ill. 320, 74 N. E. 1056; *Fairbanks & Co. v. North Bend*, 68 Neb. 560, 94 N. W. 537; *Bromagin v. Bloomington*, 234 Ill. 114, 84 N. E. 700.

⁵ *Harper v. Newburgh*, 159 N. Y. App. Div. 695; *Moffett Co. v. Rochester*, 178 U. S. 373, 44 L. Ed. 1108.

⁶ *New York v. Dowd Lumber Co.*, 140 N. Y. App. Div. 358.

siciously or intentionally enters into an agreement, his apparent agreement being the result of an honest mistake in transcription. In such a case, he may not have reformation in equity as this may only be given in cases of mutual mistake.¹ He may, however, have a rescission of the contract; for rescission may be had for a unilateral mistake. In the view of the law, there was no meeting of the minds and hence the court may rescind the contract for the apparent mistake of one party only, and in order to do this, it is not necessary that there should be fraud or inequitable conduct on the side of the other party. Relief may be had from an unconscionable bid through rescission or cancellation.²

It appears that relief may be had against a negligent omission, as long as the bidder is not guilty of gross negligence.³ Under such circumstances, injunction will not be issued against a return of deposit.⁴ Where accordingly a bidder in preparing his estimate because of his hurry to get his bid in, by mistake turned two pages of his book instead of one and thus omitted to carry forward a material portion of his estimate, making his bid several thousand dollars less than he intended, the acceptance of such a bid could not create a meeting of minds and, in equity, he may have rescission and a return of his deposit.⁵ In a case of mistakes in figures aggregating many thousands of dollars differing from what a bidder intended to make, there is likewise no meeting of the minds and there

¹ *New York v. Dowd Lumber Co.*, *supra*; *Moffett Co. v. Rochester*, *supra*.

² *Harper v. Newburgh*, *supra*; *Moffett Co. v. Rochester*, *supra*; *New York v. Dowd Lumber Co.*, *supra*; *Board of Sch. Comm'rs v. Bender*, 36 Ind. App. 164, 72 N. E. 154. See *New York v. Seeley T. Co.*, 149 N. Y. App. Div. 98, 208 N. Y. 548.

³ *Moffett Co. v. Rochester*, *supra*; *Barlow v. Jones*, 87 Atl. (N. J. Eq.) 649.

⁴ *Barlow v. Jones*, *supra*.

⁵ *Board of Sch. Comm'rs v. Bender*, *supra*.

can be no contract from which relief in equity will not be granted which will include a return of the deposit.¹ Where, however, a bidder in his proposal to perform work states that his information concerning the work to be done and the materials to be furnished for the completion of his contract was secured by personal investigation and not from estimates furnished by the State, he cannot rely upon a mere suggestion, made in the estimate sheets which directs his inquiry for stone to an available source of supply. So, when it turns out that stone is not available at such place, he cannot refuse to execute the contract on the claim of a mutual mistake of fact as to the possibility of obtaining the stone at such place. Accordingly he is not entitled to a mandamus, upon such a state of facts, to compel a return of his deposit money which is forfeited by a refusal to execute the contract.²

When estimates of amounts and quantities of material to be furnished and work to be done are not even approximately correct, and whether they are or not, could only be ascertained by a skilled engineer, by correct scaling of maps and plans, the statement that they are approximate only will not prevent a contractor from obtaining relief in equity. Such a contract is entered into under a mutual mistake and if followed by prompt action after a discovery of the mistake will afford ground for rescission of the contract.³

Similarly where courts can properly find mutual mistake in a bid, such may be the subject of an action for reformation, or for rescission.⁴

¹ Moffett Co. v. Rochester, *supra*.

² Matter of Semper v. Duffey, 227 N. Y. 151, 124 N. E. 743.

³ Long v. Athol, 196 Mass. 497, 82 N. E. 665.

⁴ U. S. v. Milliken Imprinting Co., 202 U. S. 168, 50 L. Ed. 980; Long v. Athol, 196 Mass. 497, 82 N. E. 665.

§ 120. Deposit Money with Bids—Forfeiture Measure of Damage for Failure to Execute Contract.

The provision in statutes governing bidding on public work, that a bond or other security such as cash or a certified check shall accompany the bid, is mandatory, and bids proffered without a compliance therewith are a nullity. The purpose of requiring such deposit to be made is not only to insure good faith on the part of bidders but to indemnify the public body against the expense of readvertising.¹ Such deposit is also to advise bidders, if the contract is awarded to them and they refuse to enter into it, the precise amount of damage they will have to pay. The only damage a contractor can be subjected to for refusing to execute the contract after its award to him is the forfeiture of his deposit.² The only bond which the public body can require is the statutory bond. Where the statute determines the amount of the deposit to be the amount of the damage, a surety who gave a bond conditioned to pay the difference between the sum which the bidder would be entitled to on completion and the sum the public body would be obligated to pay to another contractor on reletting, cannot be held by the public body to any damages beyond those mentioned in the statute.³ But where there is no such limitation in the statute, actual damage which is the increased cost is recoverable.

A public body may lawfully require a contractor, where the amount is not provided by statute, to furnish a bond, in its discretion, in a reasonable sum, which will not prevent fair and honest competition.⁴

¹ *Erving v. Mayor*, 131 N. Y. 133, 29 N. E. 1101; *New York v. Seely Taylor Co.*, 149 App. Div. 98, 208 N. Y. 548, 101 N. E. 1098; *Matter of Semper v. Duffey*, 227 N. Y. 151, 124 N. E. 743.

² *New York v. Seely Taylor Co.*, *supra*.

³ *New York v. Seely Taylor Co.*, *supra*; *Selpho v. Brooklyn*, 5 App. Div. 529, 158 N. Y. 673, 52 N. E. 1126.

⁴ *Selpho v. Brooklyn*, *supra*.

And under an ordinance passed pursuant to lawful delegation of power it may exact a bond in addition to the usual bond, conditioned to pay materialmen and workmen.¹ In order to forfeit a deposit under these statutes, it is essential that the bidder have written notice that the contract has been awarded to him.²

If the statute requires a cash deposit, a certificate of deposit or certified check is its equivalent and will satisfy the statute.³ The award of the contract constitutes an approval of the sufficiency of the deposit.⁴

Where a bidder has paid the usual deposit money which accompanied a bid on public work to the public body, and the latter has accepted his bid, but the bidder refuses to enter into a contract, he is not estopped from showing that the preliminary proceedings were defective and illegal or that a contract if made would be illegal and from requiring a return of his deposit.⁵ The maxim *in pari delicto potior conditio possidentis* has no application to such a case, for one who pays money under an illegal contract may recover it back before the contract is executed.⁶

The statute requiring forfeiture of a deposit for failure to enter into a contract contemplates a contract based upon legal proceedings. Where the proceedings are illegal his bid is a naked offer met and supported by no consideration. A promise resting upon a consideration which has totally failed is no longer binding, and a deposit of money accompanying such a promise is recoverable at law.⁷

¹ Buffalo Cement Co. v. McNaughton, 90 Hun, 74, 156 N. Y. 702.

² Erving v. Mayor, *supra*.

³ People v. Contracting Bd., 27 N. Y. 378.

⁴ Baird v. New York, 83 N. Y. 254.

⁵ Perine Cont. & Pav. Co. v. Pasadena, 116 Cal. 6, 47 Pac. 777; Fairbanks, Morse & Co. v. North Bend, 68 Neb. 560, 94 N. W. 537.

⁶ Fairbanks, Morse & Co. v. North Bend, *supra*.

⁷ Perine Cont. & Pav. Co. v. Pasadena, *supra*.

In a proper case, however, failure to execute the contract forfeits the security, since this is a term of the agreement of deposit, and if the provisions of the statute regarding the forfeiture are followed, no relief will be granted, for a party will not be aided contrary to the express terms of his own contract.¹

¹ *Morgan Park v. Gahan*, 136 Ill. 215, 26 N. E. 1085; *Erving v. New York*, 131 N. Y. 133, 29 N. E. 1101; *New York v. Seely Taylor Co.*, 149 N. Y. App. Div. 98, 208 N. Y. 548, 101 N. E. 1098; *Matter of Semper v. Duffey*, 227 N. Y. 151, 124 N. E. 743; *Mutchler v. Easton*, 148 Pa. St. 441, 23 Atl. 1109; *Langley v. Harmon*, 97 Mich. 347, 56 N. W. 761; *Willson v. Baltimore*, 83 Md. 203, 34 Atl. 774; *Middleton v. Emporia*, 106 Kan. 107, 186 Pac. 981.

CHAPTER XIX

LETTING TO LOWEST BIDDER

§ 121. Lowest Bidder—Who is Lowest Bidder—Rules Determining.

If these statutes regulating competitive bidding do not provide that public authorities, after inviting proposals by public notice, shall accept the lowest proposal, it is clear that the intention of the legislature is that they shall make such contract as in their judgment the public interests require.¹ But, on the other hand, where the intent of the statute is to require a letting to the lowest bidder, a contract not so let is illegal and void.²

§ 122. Limitations on Power to Reject Bids.

The duty of public officials in the examination of proposals and the awarding of contracts is judicial in its nature and character, and the award is the result of a judicial act.³ The award of a contract when free from fraud,

¹ *Knowles v. New York*, 176 N. Y. 430, 68 N. E. 860; *Baird v. New York*, 96 N. Y. 567; *Greene v. Mayor*, 60 N. Y. 303; *Talcott v. Buffalo*, 125 N. Y. 280, 26 N. E. 263; *Erving v. Mayor*, 131 N. Y. 133, 29 N. E. 1101; *Mayor v. County of Hampden*, 141 Mass. 74, 6 N. E. 757; *Schefbauer v. Kearney*, 57 N. J. L. 588, 31 Atl. 454; *Oakley v. Atlantic City*, 63 N. J. L. 127, 44 Atl. 651; *Kundinger v. Saginaw*, 132 Mich. 395, 93 N. W. 914; *State v. Lincoln County*, 35 Neb. 346, 53 N. W. 147; *Crowder v. Town of Sullivan*, 128 Ind. 486, 28 N. E. 94; *Elliott v. Minneapolis*, 59 Minn. 111, 60 N. W. 1081; *Dillingham v. Spartanburg*, 75 S. C. 549, 56 S. E. 381.

² *Anderson v. Fuller*, 51 Fla. 380, 41 So. 684; *Phelps v. Mayor*, 112 N. Y. 216, 19 N. E. 408; *Walton v. Mayor*, 26 N. Y. App. Div. 76; *Moran v. Thompson*, 20 Wash. 525, 56 Pac. 29; *Weitz v. Indep. Dist. Des Moines*, 79 Iowa, 423, 44 N. W. 696; *Santa Cruz R. P. Co. v. Broderick*, 113 Cal. 628, 45 Pac. 863; *Chicago v. Hanreddy*, 211 Ill. 24, 71 N. E. 834; *LeTourneau v. Hugo*, 90 Minn. 420, 97 N. W. 115.

³ *Erving v. Mayor*, 131 N. Y. 133, 29 N. E. 1101; *East River G. L. Co. v.*

collusion, corruption or bad faith is not the subject of judicial revision. When the statutes provide for the letting of the contract to the lowest and best bidder or the lowest responsible bidder, such language of course invests the authorities with a broader discretion than where it provides merely for an award to the lowest bidder, and when the authorities in the performance of their duty make the award, the courts may not substitute their discretion for that of the public body vested with it by law.¹

But they may not arbitrarily refuse to accept the lowest bid without any facts tending to show that it is not that of a responsible bidder. Any arbitrary determination to accept the highest bid, without facts justifying it, cannot have the effect of a judicial determination.²

§ 123. Rejecting all Bids.

The mere fact that a party who has made proposals is the lowest bidder does not necessarily entitle him to the contract, nor does it constitute an award of the contract to him under the statutes regulating the letting of work upon competitive bidding.³ Although the statute provides that the work shall be awarded to the lowest bidder, this language does not compel the making of a contract even with such lowest bidder. Where it appears that the best interests of the public body demand that none of the bids

Donnelly, 93 N. Y. 557; *People ex rel. Coughlin v. Gleason*, 121 N. Y. 631, 25 N. E. 4; *Brown v. Houston*, 48 S. W. (Tex.) 760.

¹ *Inge v. Mobile*, 135 Ala. 187, 33 So. 678; *Talcott v. Buffalo*, 125 N. Y. 280, 26 N. E. 263.

² *Talcott v. Buffalo*, *supra*; *People ex rel. v. Kent*, 160 Ill. 655, 43 N. E. 760; *State v. McGrath*, 91 Mo. 386, 3 S. W. 846; *Interstate Vit. B. Co. v. Philadelphia*, 164 Pa. St. 477, 30 Atl. 383; *Reuting v. Titusville*, 175 Pa. St. 512, 34 Atl. 916; *Inge v. Mobile*, 135 Ala. 187, 33 So. 678; *Scheffbauer v. Kearney*, 57 N. J. L. 588, 31 Atl. 454; *People ex rel. Coughlin v. Gleason*, 121 N. Y. 631, 25 N. E. 4; *Kelling v. Edwards*, 116 Minn. 484, 134 N. W. 221.

³ *Erving v. Mayor*, 131 N. Y. 133, 29 N. E. 1101.

should be accepted, the public authorities, acting in good faith, have the right to reject all bids and advertise over again.¹ By many statutes such power is expressly reserved as well as by the terms of the proposals. By statute it is also provided in many jurisdictions that without rejecting all bids an award may be made to one other than the lowest bidder by the vote or approval of the governing body, or governing financial board of the municipality.² But the opening of bids and the ascertainment of who is the lowest bidder, together with the announcement of that fact, do not constitute an award. The right to the award of a contract or to have a contract executed with such lowest bidder does not arise upon any of these facts. Public officers still have the right to reject all bids.³ But after a bidder has been notified that his bid is the lowest and that a contract will be awarded to him, the public officials have no power to reject all bids and readvertise. The rights of the parties by such express acceptance become fixed.⁴

§ 124. Making Award on Contingency.

A public officer or head of department has no power to award a contract conditioned upon the consent or approval of other boards or officials.⁵ A conditional acceptance of a bid can confer no rights upon a bidder.⁶ An accep-

¹ *Walsh v. Mayor*, 113 N. Y. 142, 20 N. E. 825; *Molloy v. New Rochelle*, 198 N. Y. 402, 92 N. E. 94.

² Greater N. Y. Charter, § 419.

³ *Williams v. New York*, 118 N. Y. App. Div. 756, 192 N. Y. 541, 84 N. E. 1123.

⁴ *Lynch v. New York*, 2 N. Y. App. Div. 213; *Pennell v. Mayor*, 17 *Id.* 455; *Beckwith v. New York*, 121 *Id.* 462; *Williams v. New York*, *supra*.

⁵ *Williams v. New York*, 118 N. Y. App. Div. 756, 192 N. Y. 541, 84 N. E. 1123.

⁶ *Williams v. New York*, *supra*; *North Eastern Cons. Co. v. North Hempstead*, 121 N. Y. App. Div. 187.

tance, therefore, upon condition that an additional appropriation shall be made by some other body is in violation of the statute requiring a prior appropriation as an essential to the validity of public contracts.¹

Acceptance upon condition that leave shall be granted by a board to issue bonds is invalid.² In like manner, a bid accepted upon condition that it was not to be binding in case certain legislation then pending was not passed is invalid and fraudulent, as a mere attempt to defeat a changed mode of entering into contracts from affecting these bids.³

§ 125. Award to Lowest Bidder—Competitive Bidding Statutes—Construed to Effect Purpose.

These provisions of law are of great importance to the welfare and interests of large public corporations acting through their public officers and agents and were designed to establish a policy which should be carried into effect without technicalities or a narrow interpretation which will render them of no avail.⁴ They are not to be construed so as to prevent the public from doing the work itself through its own agencies.⁵

§ 126. Award of Public Contracts—When no Statutory Conditions Exist.

In the absence of any of the provisions or restrictions of the character mentioned in the preceding sections or of similar statutory or constitutional limitations a binding

¹ *Williams v. New York*, *supra*.

² *North Eastern Cons. Co. v. North Hempstead*, *supra*.

³ *Matter of Raymond*, 21 Hun, 229, 85 N. Y. 646.

⁴ *Greene v. Mayor*, 60 N. Y. 303, 318. See *Knowles v. New York*, 176 N. Y. 430, 68 N. E. 860; *People ex rel. Lyon Co. v. McDonough*, 173 N. Y. 181, 65 N. E. 963.

⁵ *Home Bldg. & Con. Co. v. Roanoke*, 91 Va. 52, 20 S. E. 895, 27 L. R. A. 551.

agreement may be made by a proposal and acceptance.¹ The only qualification is that the proposal of the contractor shall be definite and the acceptance by the public body shall be unqualified.²

§ 127. When not Required.

Where the governing body of a municipality or other public corporation does not abuse its discretionary powers and acts without fraud and within the scope of its corporate powers, if the charter or statute under which it acts does not prescribe the manner or mode of entering into a public contract, it may award such contracts without letting them to the lowest bidder.³

§ 128. When Competitive Bidding not Required—Monopoly—Patents—Professional Skill—Special Knowledge and Skill.

Statutes providing that public contracts must be based upon sealed bids obtained through public advertising do not apply if the subject-matter is such that the supply to be purchased is only obtainable from one person which has been granted an exclusive franchise or monopoly of the commodity needed.⁴ Although there is more than one source of supply, if there is incongruity in competing for it, and its selection involves choice of quality, quantity and source resting largely upon special knowledge and skill it comes within the exceptions and the statute does not apply.⁵ For similar reasons, such provisions fail of

¹ *Denton v. Atchison*, 34 Kan. 438, 8 Pac. 750; *Middleton v. Emporia*, 106 Kan. 107, 186 Pac. 981; *U. S. v. Purcell En. Co.*, 249 U. S. 313, 63 L. Ed. 620.

² *Howard v. Maine Industrial School*, 78 Me. 230, 3 Atl. 657.

³ *Elliot v. Minneapolis*, 59 Minn. 111, 60 N. W. 1081; *Yarnold v. Lawrence*, 15 Kan. 103.

⁴ *Harlem G. L. Co. v. Mayor*, 33 N. Y. 309; *Hartford v. Hartford Elec. L. Co.*, 65 Conn. 324, 32 Atl. 924.

⁵ *Gleason v. Dalton*, 28 N. Y. App. Div. 555.

application in the instance of contracts for lighting streets.¹ The fact that a particular kind of steel specified can only be obtained from one source does not unlawfully limit competition where the bidder can buy it in the open market.² Therefore, if there is a monopoly of some process or article which can only be obtained from one source the public body may make a contract for it when it is in the public interest notwithstanding the provisions of the competitive bidding statutes. They have no application to such a case unless the unreasonable result of depriving public corporations of the use of all patented appliances or processes and of the benefits of modern invention is imported into the intent and design of such a statute.³ If, however, the specifications name not a particular commodity but the product of a particular company and the article is a common article of manufacture and sale, the bid under such specifications violates the provision of law requiring work to be let to the lowest bidder.⁴ The difficulty which this question of the purchase of patented articles has created has been solved by legislative bodies

¹ *Blank v. Kearny*, 44 N. Y. App. Div. 592.

² *Knowles v. New York*, 37 Misc. 195, 74 N. Y. App. Div. 632, 176 N. Y. 430, 68 N. E. 860. But here the statute requiring competition did not apply.

³ *Bye v. Atlantic City*, 73 N. J. L. 402, 64 Atl. 1056; *Milner v. Trenton*, 80 N. J. L. 253, 75 Atl. 939; *Holmes v. Comm. Coun. of Detroit*, 120 Mich. 226, 79 N. W. 200; *Swift v. St. Louis*, 180 Mo. 80, 79 S. W. 172; *Rackliffe G. Cons. Co. v. Walker*, 170 Mo. App. 69, 156 S. W. 65; *Field v. Barber A. P. Co.*, 117 Fed. 925, Rev. O. G. 194 U. S. 618; *Baltimore v. Flack*, 104 Md. 107, 64 Atl. 702; *Hobart v. Detroit*, 17 Mich. 246; *La Coste v. New Orleans*, 119 La. 469, 44 So. 267; *Verdin v. St. Louis*, 131 Mo. 36, 33 S. W. 480; *Silsby Mfg. Co. v. Allentown*, 153 Pa. St. 319, 26 Atl. 646; *Perine Cont. Co. v. Quackenbush*, 104 Cal. 684, 38 Pac. 533; *State v. Bd. of Commr's Shawnee County*, 57 Kan. 267, 45 Pac. 616; *Contra Siegel v. Chicago*, 223 Ill. 428, 79 N. E. 280; *Fishburn v. Chicago*, 171 Ill. 338, 49 N. E. 532; *Diamond v. Mankato*, 89 Minn. 48, 93 N. W. 911.

⁴ *Smith v. Syracuse Imp. Co.*, 161 N. Y. 484, 55 N. E. 1077; *Kansas City Hyd. P. B. Co. v. Nat. Surety Co.*, 157 Fed. 620; *Nat. Surety Co. v. Kansas City Hyd. P. B. Co.*, 73 Kan. 196, 84 Pac. 1034; *Atkin v. Wyandotte Coal & L. Co.*, 73 Kan. 768, 84 Pac. 1040.

in several ways. In some jurisdictions, if the owner of the patent files an agreement with the public to furnish the patented supply to the successful bidder at a stated price, purchase of patented articles is allowed.¹

In others, the right to provide as compensation to the patentee a royalty reasonable in amount for the use of his material is provided as a term of the specifications, and as long as the patentee cannot hold the right to use the process so as to designate the contractor, there is no interference with the statutory competition contemplated.²

But in these jurisdictions, the doctrine above set out that competitive statutes can have no application, seems to be fully sustained. It is simply because the public authorities properly charged with the responsibility of selection of durable materials and supplies have hedged in the use of patented articles by the limitations named that these decisions have arisen. But their clear purport is to the effect that municipalities should be permitted to use patented articles either by direct purchase or under such conditions as the public bodies themselves may fix or the legislature may establish where it has dealt with the subject.

Where the contract is for a service continuous in its character but terminable at the pleasure of the public body, the mere fact that it may be continued so long as to cost in the aggregate more than the amount limited by

¹ *Ford v. Great Falls*, 46 Mont. 292, 127 Pac. 1004; *Saunders v. Iowa City*, 134 Iowa, 132, 111 N. W. 529; *McEwen v. Cœur D'Alene*, 23 Idaho, 746, 132 Pac. 308; *Johns v. Pendleton*, 66 Oreg. 182, 133 Pac. 817.

² *Tousey v. Indianapolis*, 175 Ind. 295, 94 N. E. 225; *Reed v. Rackliffe G. C. Co.*, 25 Okla. 633, 107 Pac. 168; *Warren Bros. v. New York*, 190 N. Y. 297, 83 N. E. 59; *Allen v. Milwaukee*, 128 Wis. 678, 106 N. W. 1099. (These are cases where statutes regulating the matter of purchase of patented articles are directly construed. Some text writers discuss the "Wisconsin rule," but there is no judicial rule but a statute interpretation.)

(See cases cited, *ante*, notes 1 and 2, where all of these courts except Indiana unanimously agree that competitive statutes could not apply to patents.)

statute for contracts let without competition, will not bring it within the statute. The statute was intended to apply to contracts for particular jobs involving liability to pay such amount, not to services for an indefinite period involving no obligation to continue the service.¹ It has no application to contracts for personal service,² nor to professional services.³

But bids requiring the use of certain kinds of material or better do not violate the provision of the statute.⁴ In some jurisdictions the character of the use controls the right to purchase patented supplies, and accordingly a city acting for itself may buy and make use of patented articles for its municipal purpose, but not where it charges the property of individuals to pay therefor by assessment.⁵

§ 129. When not Required—Extra Work—Substitution of Materials.

Statutes regulating the award of contracts to the lowest bidder after advertising for bids do not prevent the public body from inserting in a contract for public work a provision for the payment of extra work which becomes necessary as the general work progresses.⁶ Such extra work need not be let upon separate advertisement.⁷ Sometimes, it is provided by statute that in the contract, a clause may be inserted to provide for additional work or

¹ *Swift v. Mayor*, 83 N. Y. 528, 537.

² *Smithmeyer v. U. S.*, 147 U. S. 342, 37 L. Ed. 196, aff'g 25 Ct. Cl. 481.

³ *Smith v. Mayor*, 5 Hun, 237; *People ex rel. Smith v. Flagg*, 17 N. Y. 584.

⁴ *Oak Park v. Galt*, 231 Ill. 365, 83 N. E. 209; *Muff v. Cameron*, 134 Mo. App. 607, 114 S. W. 1125, 117 S. W. 116.

⁵ *Monaghan v. Indianapolis*, 37 Ind. App. 280, 76 N. E. 424; *Allen v. Milwaukee*, *supra*.

⁶ *Clark & Sons Co. v. Pittsburg*, 217 Pa. St. 46, 66 Atl. 154.

⁷ *Idem*.

supplies not exceeding a stated percentage of the contract price,¹ or exceeding a sum provided by law.²

But contingencies for extra work must be provided for beforehand in the specifications and contract in order to permit payment therefor without advertised letting. A contract which leaves the payment for extra work to be agreed upon by private arrangement or agreement between the public body and the contractor is contrary to the express provisions of these statutes and is void, and no recovery can be had either upon the express arrangement made or upon an implied obligation. The addition of an entirely new work to a contract already awarded is for stronger reasons equally to be condemned.³ When material provided by a contract let under the statute proves to be defective, these statutes forbid private substitution between the public officials and the contractor of new material or of a new form of construction in place of that provided by the contract.⁴

Where the statute providing for awarding of public contracts to the lowest bidder is limited in scope and does not include alterations or additions, these may be provided for without advertising.⁵

§ 130. When Bids not Required—Certificate of Head of Department—Prior Appropriation.

Contracts under certain stated amounts provided by law may be made by public officials without competitive bidding. Whatever is not included within the provisions

¹ Greater N. Y. Charter, § 419.

² *Sadler v. Eureka County*, 15 Nev. 39; *McBrien v. Grand Rapids*, 56 Mich. 95, 22 N. W. 206.

³ *Ely v. Grand Rapids*, 84 Mich. 336, 47 N. W. 447.

⁴ *Cahn v. Metz*, 115 N. Y. App. Div. 516.

⁵ *Escambia County v. Blount Cons. Co.*, 66 Fla. 129, 62 So. 650; *Pacific Bridge Co. v. Clackamas County*, 45 Fed. 217.

of these statutes may be let privately and without competition in the discretion of public officials.¹ In some jurisdictions the contract can only be let without competition provided the head of department has certified to the necessity of the work and the money for the expenditure has been appropriated.²

The object of these provisions of law is not to prohibit contracts, but to prohibit the expenditure of money therefor, unless the right thereto was certified and unless the fund existed from which payment might be made.³ A contract made without the certificate and the appropriation is an absolute nullity, and no recovery can be had thereunder,⁴ even though the city has had the benefit of the work done,⁵ or the supplies furnished,⁶ and a mere verbal order will not suffice or take the place of the formal certificate required by the statute.⁷ As between the contractor and the city this certificate of the proper officer is conclusive, where there is no fraud or collusion, and where the facts indicate that the necessity certified was a possible incident of the work to be done or the supply to be furnished,⁸ and even when signed by a subordinate, is presumed to be authorized.⁹ Where employment is terminable at pleasure, though continuous in character, the fact that it might be continued to exceed the money limit placed upon non-competitive contracts will not bring

¹ *People v. Kane*, 43 N. Y. App. Div. 472, aff'd 161 N. Y. 380, 55 N. E. 946.

² *People v. Kane*, *supra*; *Greater N. Y. Charter*, §§ 149, 419; *Dady v. New York*, 65 Misc. 382, 148 N. Y. App. Div. 956.

³ *People v. Kane*, *supra*.

⁴ *Donovan v. New York*, 33 N. Y. 291.

⁵ *Donovan v. New York*, *supra*; *Walton v. Mayor*, 26 N. Y. App. Div. 76.

⁶ *Keane v. New York*, 88 N. Y. App. Div. 542.

⁷ *Dady v. New York*, 65 Misc. 382, 148 App. Div. 956; *Walton v. Mayor*, 26 N. Y. App. Div. 76; *Keane v. New York*, *supra*.

⁸ *Brady v. New York*, 112 N. Y. 480, 20 N. E. 390.

⁹ *Culp v. New York*, 146 N. Y. App. Div. 326.

it within the terms of the statute requiring competition.¹ Supplies obtained upon distinct orders each involving an expenditure of less than the money limit for non-competitive bids but in the aggregate exceeding such amount can only be validly made upon public letting under competitive bids.²

§ 131. When Bids not Required.

When the provisions of statutes requiring public letting by competitive bidding are restricted in their scope to certain classes of public contracts, contracts which cover classes of work other than those described are under familiar canons of construction excluded from the operation of the statutes.³ Therefore, statutes which provide for competitive bids for street work do not include lighting of streets.⁴ The lighting contract of a public body will not be controlled by a statute requiring competitive bids for public works.⁵ The renting of rooms is not included in such a statute affecting work or supplies.⁶ Additions and alterations do not come within the terms of a statute requiring contracts for erecting or building of a house.⁷

§ 132. The Same—Emergency.

The provisions of such statutes do not apply to work

¹ *Swift v. Mayor*, 83 N. Y. 528; *People v. Kane*, 161 N. Y. 380, 55 N. E. 946.

² *Walton v. Mayor*, 26 N. Y. App. Div. 76. (The result reached in this case seems to be in conflict with the doctrine of *Swift v. Mayor*, *supra*, and *People v. Kane*, *supra*); *Gamewell F. A. Tel. Co. v. Los Angeles*, 187 Pac. (Cal.) 163.

³ *Davies v. New York*, 83 N. Y. 207, 214; *Elec. L. &c. Co. v. San Bernardino*, 100 Cal. 348, 34 Pac. 819; *Escambia County v. Blount Cons. Co.*, 66 Fla. 129, 62 So. 650; *Walsh v. Columbus*, 36 Ohio St. 169; *Atlantic Gas & W. Co. v. Atlantic City*, 73 N. J. L. 360, 63 Atl. 997.

⁴ *Elec. L. &c. Co. v. San Bernardino*, *supra*.

⁵ *Atlantic Gas Co. v. Atlantic City*, *supra*.

⁶ *Davies v. New York*, *supra*.

⁷ *Escambia County v. Blount Cons. Co.*, *supra*.

done or materials furnished to meet an emergency creating a necessity for such work or materials which must be met at once.¹ Contingencies continuously arise in the administration of public affairs when services, materials and property above the prescribed limit for non-competitive bids are immediately needed and where competitive bids and written contracts are unserviceable or impossible. The statutes were never intended to apply to such cases. Whenever, therefore, the nature of the service or of the materials or property needed for public use, or the time within which these must be had is so short that recourse to competitive bids would cause irreparable mischief, the acts cannot apply. Such emergencies were not amongst the mischiefs these statutes were designed to correct.² The general law of the State must be regarded as an amendment of or at least a part of all municipal charters. When it imposes a duty on a public officer to provide services or supplies, or a place in which to render the services or use the supplies, for those whose care and treatment is intrusted to and charged upon certain public officers, it becomes the duty of such officers to comply with such general law whether or not there is any provision in the charter to raise money or contract debts for that purpose.³ But such provisions of general law do not abrogate the methods of procedure required by municipal charters to make contracts, if all that the emergency requires can be

¹ *Harlem G. L. Co. v. Mayor*, 33 N. Y. 309; *North River E. L. & P. Co. v. New York*, 48 N. Y. App. Div. 14; *Blank v. Kearny*, 44 N. Y. App. Div. 592; *Dady v. New York*, 65 Misc. 382, 148 N. Y. App. Div. 956; *Washburn v. Shelby County Comm'rs*, 104 Ind. 321, 3 N. E. 757; *U. S. v. Speed*, 8 Wall. (U. S.) 77, 19 L. Ed. 449, aff'g 2 Ct. Cl. 429; *Stevens v. U. S.*, 2 Ct. Cl. 95; *Reeside v. U. S.*, 2 Ct. Cl. 1.

² *Harlem G. L. Co. v. Mayor*, *supra*; *North River Elec. L. Co. v. New York*, *supra*; *Blank v. Kearney*, *supra*; *Matter of Plattsburgh*, 157 N. Y. 78, 51 N. E. 512; *Schneider v. U. S.*, 19 Ct. Cl. 547; *Child v. U. S.*, 4 Ct. Cl. 176.

³ *Matter of Plattsburgh*, *supra*.

had by compliance with the charter.¹ It was never intended, however, that public officers charged with a positive duty should wait until a board or other public body be called together to make an order or an appropriation before they would respond to their public duty and meet some critical emergency.² When the statute includes emergency contracts, a contract should follow its terms in order to be valid.³

§ 133. Competitive Bids—When Bids not Required— Monopoly—Patents.

When in the very nature of things competitive bids are impossible from the fact that a monopoly of the particular supply exists either because one person controls the supply,⁴ or has been granted an exclusive franchise⁵ to sell it, or it results from a patent⁶ and the patented article can only be had from one person, these statutes relating to competitive bidding do not apply.

Where competition is impossible in these circumstances, it cannot be supposed that the legislative purpose was to compel a public body to go through the useless and farcical form of a letting to the lowest bidder.

In some jurisdictions, the purchase of a patented article is controlled by special statute which must be followed.⁷

¹ Matter of Plattsburgh, *supra*.

² Washburn v. Shelby County Comm'rs, *supra*; Clark Co. v. Allegheny City, 143 Fed. 644.

³ Newton v. Toledo, 8 Ohio C. Dec. 607.

⁴ Detwiller v. Mayor, 46 How. Pr. 218; Gleason v. Dalton, 28 N. Y. App. Div. 555.

⁵ Harlem Gas Co. v. New York, 33 N. Y. 309; Hartford v. Hartford Elec. Co., 65 Conn. 324, 32 Atl. 925; Purley Water Co. v. Vaughn, 115 Wis. 470, 91 N. W. 971.

⁶ Baird v. Mayor, 96 N. Y. 567; *Re Dugro*, 50 N. Y. 513; Nicholson v. Painter, 35 Cal. 699; Kilvington v. Superior, 83 Wis. 222, 53 N. W. 487.

⁷ Warren Bros. v. New York, 190 N. Y. 297, 83 N. E. 59; Allen v. Milwaukee, 128 Wis. 678, 106 N. W. 1099.

§ 134. Letting of Public Contracts—Competitive Bidding—
When Bids not Required—Scientific Knowledge—
Professional Skill.

When the services to be rendered require scientific knowledge and professional skill, this character of service need not be obtained through competitive bids.¹

§ 135. Opening the Bids.

The provisions of competitive bidding statutes which require that all bids shall be publicly opened and declared by the officer advertising for bids or in the presence of certain officials or public body are not merely permissive but imperative and mandatory, and unless complied with will destroy the validity of any contract based upon such proceedings.² The officer appointed by law to perform this duty cannot delegate it to his subordinate.³

A delay of one day after bids were received for which an adjournment was taken to bring the officials together who were charged with the duty of opening the bids will not affect acceptance or rejection. The purpose of the statute is that the bids shall be examined within a reasonable time.⁴

Even where the statute provides for opening of bids and that the public officials shall then ascertain or determine whose is the most favorable proposal, this does not restrict them to an instant determination, but authorizes an adjournment for that purpose.⁵

¹ People *ex rel.* Smith *v.* Flagg, 5 Abb. Pr. 232; Peterson *v.* Mayor, 17 N. Y. 449; Horgan & Slattey, Inc. *v.* New York, 114 N. Y. App. Div. 555; Harlem G. L. Co. *v.* Mayor, 33 N. Y. 309; Schieffelin *v.* New York, 65 Misc. 609; Newport News *v.* Potter, 122 Fed. 321.

² People *ex rel.* Rodgers *v.* Coler, 35 N. Y. App. Div. 401; McCord *v.* Lauterbach, 91 *Id.* 315; Edwards *v.* Berlin, 123 Cal. 544, 56 Pac. 432.

³ People *ex rel.* Rodgers *v.* Coler, *supra*.

⁴ McCord *v.* Lauterbach, *supra*.

⁵ Lilienthal *v.* Yonkers, 6 N. Y. App. Div. 138, 154 N. Y. 766; Tingle *v.* Port Chester, 101 N. Y. 294.

If the minutes of the board or body do not show that bids were opened and declared this is prima facie proof that the statute was not complied with,¹ but where they do a contrary presumption arises.²

¹ Edwards v. Berlin, *supra*.

² City Street Imp. Co. v. Laird, 138 Cal. 27, 70 Pac. 916.

CHAPTER XX

FORM OF CONTRACT—WRITTEN CONTRACTS

§ 136. Necessity of Written Contracts—In General.

Public contracts need not necessarily be in writing to be valid, and unless a statute requires it the contract need not be in writing. Oral public contracts are valid and binding where they do not conflict with the requirements of the Statute of Frauds, and these will be satisfied even by the minutes of the public body signed by its clerk.¹ Indeed if the offer expressly or impliedly permits of acceptance in the ordinary way of commercial transactions by letter or telegram duly sent to the proposer before the offer is withdrawn, a contract becomes effective upon the mailing or sending.² In like manner where a proposal follows the advertisement in competitive bidding its acceptance makes a binding contract of the same force and effect as if a formal contract had been written out and signed by the parties.³

§ 137. The Same—Federal Statute.

The provisions of the federal statutes admit of the making of a valid executory contract in such circumstances where an emergency exists.⁴ But a valid executory con-

¹ *Argus Co. v. Albany*, 55 N. Y. 495; *Peterson v. N. Y.*, 17 N. Y. 449; *New Athens v. Thomas*, 82 Ill. 259; *Athearn v. Ind. Sch. Dist.*, 33 Iowa, 105; *Fitton v. Hamilton City*, 6 Nev. 196; *Dunlap v. Water Commr's*, 151 Pa. St. 477, 25 Atl. 60; *Hardwick v. Wolcott*, 78 Vt. 23, 61 Atl. 471.

² *Burton v. U. S.*, 202 U. S. 344, 385, 50 L. Ed. 1057; *Haldane v. U. S.*, 69 Fed. 819.

³ *U. S. v. Purcell Envelope Co.*, 249 U. S. 313, 63 L. Ed. 620; *Garfield v. U. S.*, 93 U. S. 242, 23 L. Ed. 779.

⁴ Sec. 3709, U. S. Rev. Stat.; *U. S. v. Purcell Env. Co.*, 249 U. S. 313, 63 L. Ed. 620; § 3744, U. S. Rev. Stat.

tract cannot be made by federal authorities under these statutes, which are mandatory.¹ It is the ultimate formal instrument which the statute contemplates shall be signed.² But a valid contract exists, even though this statute has not been complied with, if the contract is executed.³ Advertisements, specifications, proposals and letters do not constitute the contract in writing which is required.⁴ But although the parties intend a final written contract and conduct the preliminary negotiations through correspondence and definitely agree thereby to all the terms of such final agreement, one of the parties cannot escape or evade his obligation by refusing to sign the formal contract which the parties understood was to be subsequently drawn and executed.⁵ Preliminary writings or memoranda made by the parties cannot be resorted to for the purpose of establishing the formal written contract which the statute requires.⁶ The contract must be in writing and must be signed by the contracting parties.⁷ A writing is not essential in the case of all government contracts, as there are many classes of contracts to which the provisions of the statutes do not apply.⁸

§ 138. The Same—State Statutes.

On the other hand, the State courts reach a different

¹ *Clark v. U. S.*, 95 U. S. 539, 541, 24 L. Ed. 518; *Henderson v. U. S.*, 4 Ct. Cl. 75; *McLaughlin & Co. v. U. S.*, 37 Ct. Cl. 150.

² *Monroe v. U. S.*, 184 U. S. 524, 46 L. Ed. 670, aff'g 35 Ct. Cl. 199.

³ *St. Louis Hay & Grain Co. v. U. S.*, 191 U. S. 159, 48 L. Ed. 130, aff'g 37 Ct. Cl. 281; *U. S. v. R. P. Andrews & Co.*, 207 U. S. 229, 52 L. Ed. 185, aff'g 41 Ct. Cl. 48; *U. S. v. N. Y. & P. R. S. S. Co.*, 239 U. S. 88, 60 L. Ed. 161.

⁴ *McLaughlin & Co. v. U. S.*, 36 Ct. Cl. 138; *South Boston Iron Co. v. U. S.*, 118 U. S. 37, 30 L. Ed. 69, aff'g 18 Ct. Cl. 165.

⁵ *U. S. v. P. J. Carlin Cons. Co.*, 224 Fed. 589.

⁶ *South Boston Iron Co. v. U. S.*, *supra*.

⁷ *South Boston Iron Co. v. U. S.*, *supra*; *Clark v. U. S.*, *supra*; *U. S. v. Lamont*, 2 App. D. C. 532.

⁸ Secs. 3744, 3747, U. S. Rev. Stat.; *Carlin Cons. Co. v. U. S.*, 224 Fed. 859.

conclusion with reference to the necessity for written contracts and generally hold with respect to these provisions of law which require contracts to be in writing that they are mandatory, cannot be waived and are in most instances in the nature of conditions precedent to the exercise by public bodies of the power to contract. They therefore hold these provisions of law applicable alike to contracts executed as well as executory. Accordingly since the manner of making public contracts is thus limited, where it is not followed the contract attempted to be made is illegal and no recovery may be had thereon even though there has been full performance and the public body has received and retained the benefits.¹ Nor will recovery of reasonable value be permitted.² This latter view does not prevail universally and there are many jurisdictions wherein recovery of reasonable value is allowed.³ It is contended that while a contract is executory it might be demanded that it be executed according to legal requirements but that no such objection should be entertained or sustained after it has been executed, since the rule of ordinary honesty and morality is applied as strongly to public bodies as to individuals.⁴ Implied liability is raised because of the receipt of money or property and the failure to return it or make compensation, and is founded in the general obligation

¹ *Murphy v. Louisville*, 9 Bush (Ky.), 189; *Boston Elec. Co. v. Cambridge*, 163 Mass. 64, 39 N. E. 787; *McBrian v. Grand Rapids*, 56 Mich. 95, 22 N. W. 206; *Schumm v. Seymour*, 24 N. J. Eq. 143; *McDonald v. Mayor*, 68 N. Y. 23; *Dickinson v. Poughkeepsie*, 75 N. Y. 65; *Smart v. Philadelphia*, 205 Pa. St. 329, 54 Atl. 1025; *McManus v. Phila.*, 201 Pa. St. 619, 51 Atl. 322; *Watterson v. Mayor of Nashville*, 106 Tenn. 410, 61 S. W. 782; *Starkey v. Minneapolis*, 19 Minn. 203; *Arnott v. Spokane*, 6 Wash. 442, 33 Pac. 1063.

² *Idem.*

³ *Cincinnati v. Cameron*, 33 Ohio St. 336; *Baxter Springs v. Baxter Springs L. & P. Co.*, 64 Kan. 591, 68 Pac. 63; *Beers v. Dalles City*, 16 Oreg. 334, 18 Pac. 835; *Memphis G. L. Co. v. Memphis*, 93 Tenn. 612, 30 S. W. 25; *Jungdorf v. Little Rice*, 156 Wis. 466, 145 N. W. 1092.

⁴ *Baxter Springs v. Baxter Springs L. & P. Co.*, *supra*.

to do justice which applies to public bodies as well as individuals.¹

If the execution of a written contract is provided for, in terms, in the charter of a public corporation, but a written contract is not executed, yet the materials and work provided for are furnished and used, the neglect to execute a written contract will not prevent recovery of the reasonable value of whatever is furnished.²

§ 139. Oral Modification of a Contract Required by Law to be in Writing.

Where the statute requires that all contracts relating to the public affairs shall be in writing, signed and executed in the name of the public body, the power to change or modify such public contracts is controlled and limited and the power must be exercised in the manner pointed out by law.³ An oral modification is invalid and ineffectual, as such provision is mandatory and cannot be waived or disregarded.⁴ Where under the requirements of similar statutes provision is made for the modification and change of the contract in writing, such a provision may be waived.⁵

§ 140. Opening of Bids and Adoption of Resolution of Award—Whether Effective to Make Contract Where Writing Required.

Where these competitive bidding statutes require a contract in writing, the opening of the proposals or bids and the adoption of a resolution of award do not complete the

¹ *Memphis G. L. Co. v. Memphis*, *supra*.

² *Central Bitulithic Pav. Co. v. Vil. of Highland Park*, 164 Mich. 223, 129 N. W. 46; *Carey v. East Saginaw*, 79 Mich. 43, 44 N. W. 168. See *Ft. Madison v. Moore*, 109 Iowa, 476, 80 N. W. 527.

³ *McManus v. Phila.*, 201 Pa. St. 619, 51 Atl. 322.

⁴ *McManus v. Phila.*, *supra*.

⁵ *Maryland Steel Co. v. U. S.*, 235 U. S. 451, 59 L. Ed. 312.

contract.¹ And where parties, although agreed on the terms, intend that they shall be reduced to writing before the bargain shall be considered complete, neither party is bound until that is done so long as the contract remains without any acts done under it on either side.²

§ 141. Contract Signed by Only One Party.

If a contract is prepared in writing and presented to a contractor already signed by the officials of the public body and he expresses his willingness to sign it, but before he is permitted to sign a public official takes it away, the minds of the contracting parties then meet upon the terms embraced in the writing and the contract is complete. When the contractor is directed to proceed with the work and he completes it, he is entitled to recover the compensation provided; or if there be none, its value. The writing is simply evidence of a contract. The contract consists of the actual agreement between the parties. If a contract is reduced to writing and signed by one of the parties and accepted and acted upon by the other it will bind as if signed by both of the parties.³

§ 142. Kind of Contract which Contractor Must Sign— Power of Public Body to Make Contract which Differs from Advertisement.

Where a contractor for public work bids upon certain plans, specifications and conditions set out or referred to in the notice or advertisement for bids he cannot be required to sign and execute a different form of contract

¹ *Hepburn v. Phila.*, 149 Pa. St. 335, 24 Atl. 279; *Smart v. Philadelphia*, 205 Pa. St. 329, 54 Atl. 1025; *Contra*, *Ft. Madison v. Moore*, 109 Iowa, 476, 80 N. W. 527; *Pennell v. Mayor*, 17 N. Y. App. Div. 455.

² *Jersey City W. Comm. v. Brown*, 32 N. J. L. 504.

³ *Stivers v. Cherryvale*, 86 Kan. 270, 120 Pac. 361; *Hudson v. State*, 14 Ga. App. 490, 81 S. E. 362.

than such as reasonably conforms to and keeps alive the substance of these plans, specifications, conditions of work and of payment and other conditions described. These terms and conditions cannot be varied to the hurt of the contractor or to his advantage and benefit.¹ Where the contract offered for signature contains substantial provisions beneficial to the contractor or detrimental to him which were not included in or contemplated by the terms and specifications upon which bids were invited, such contract is invalid as in violation of the provisions of law controlling competitive bidding.² The contract to be signed must be the contract which was offered in the advertisement.³ The public body has no power to make material or substantial changes in the contract, after bids are opened, and award it as modified.⁴ It would be destructive of all healthy competition and of the purposes of competitive bidding, if one of the competitors could be permitted after the bids were opened to alter his bid in such manner as to make it appear below others, and then make a contract at higher prices, with a large number of such prices not in

¹ *Cotter v. Casteel*, 37 S. W. (Tex.) 791; *Diamond v. Mankato*, 89 Minn. 48, 93 N. W. 911.

² *Cotter v. Casteel*, *supra*; *Diamond v. Mankato*, *supra*; *Dickinson v. Poughkeepsie*, 75 N. Y. 65; *Van Reipen v. Jersey City*, 58 N. J. L. 262, 33 Atl. 740; *McDermott v. Street & W. Comm. Jersey City*, 56 N. J. L. 273, 28 Atl. 424; *Shaw v. Trenton*, 49 N. J. L. 339, 12 Atl. 902; *Osborn v. Lyons*, 104 Iowa, 160, 73 N. W. 650; *Wells v. Raymond*, 201 Ill. 435, 66 N. E. 210; *Inge v. Bd. of Public Works*, 135 Ala. 187, 33 So. 678.

³ *Diamond v. Mankato*, 89 Minn. 48, 93 N. W. 911; *Nash v. St. Paul*, 11 Minn. 174; *Schiffman v. St. Paul*, 88 Minn. 43, 92 N. W. 503; *Wickwire v. Elkhart*, 144 Ind. 305, 43 N. E. 216; *Dickinson v. Poughkeepsie*, 75 N. Y. 65.

⁴ *Inge v. Bd. of Public Works*, *supra*; *Wickwire v. Elkhart*, *supra*; *Le Tourneau v. Hugo*, 90 Minn. 420, 97 N. W. 115; *Fairbanks v. North Bend*, 68 Neb. 560, 94 N. W. 537; *Dickinson v. Poughkeepsie*, *supra*; *Addis v. Pittsburgh*, 85 Pa. St. 379; *Moran v. Thompson*, 20 Wash. 525, 56 Pac. 29; *Chippewa B. Co. v. Durand*, 122 Wis. 85, 99 N. W. 603; *American Lighting Co. v. McCuen*, 92 Md. 703, 48 Atl. 352; *McBrian v. Grand Rapids*, 56 Mich. 95, 22 N. W. 206; *Goshert v. Seattle*, 57 Wash. 645, 107 Pac. 860; *State ex rel. v. Toole*, 26 Mont. 22, 66 Pac. 496.

competition at all, and have inserted therein clauses for his advantage, in no manner considered by the other bidders or offered to them.¹ Nor may a public officer enter into private negotiations with a contracting firm for the purpose of reducing its original bid submitted at the time of open competition.² But this rule does not prohibit all variations from the specifications. It very properly allows a reasonable degree of latitude in the details involved in the execution of powers conferred by fundamental law which is essential to an intelligent and practical administration of public affairs. Certainly it could not be extended so far as to avoid an executed contract because of the use of words in the contract not found in the specifications, or for any mere irregularity not involving substantial rights.³

¹ *Dickinson v. Poughkeepsie*, *supra*.

² *Louchheim v. Philadelphia*, 218 Pa. 100, 66 Atl. 1121. (But there is a dictum to the contrary in *Dickinson v. Poughkeepsie*, *supra*.)

³ *Mankato v. Barber A. P. Co.*, 142 Fed. 329, 345.

CHAPTER XXI

MAKING THE AWARD

§ 143. Awarding Contract—Acceptance of Bids.

The receipt of bids, the opening and ascertaining of the lowest one and the announcement of the fact by the public bodies will not constitute an award either in fact or in law. The competitor who is lowest bidder acquires no rights from any or all of these facts to have a contract executed with him. The question of the acceptance of the bid, which is an offer, is a matter of discretion which they can exercise or not so long as they act in good faith.¹ The public body may reject all the bids and readvertise the work if in its judgment and discretion such course is for the best interests of the public. The whole matter of examining proposals and making awards is judicial in its nature.² If statutes do not interpose a barrier the public body may even make the award to one who is not the lowest bidder amongst those bidding.³ Until an award is actually made there is no contract.⁴ Where a binding contract can only be made in writing even after the award,

¹ *Williams v. New York*, 118 App. Div. 756, 192 N. Y. 541, 84 N. E. 1123; *New York v. Union News Co.*, 222 N. Y. 263, 118 N. E. 635.

² *Erving v. Mayor*, 131 N. Y. 133, 29 N. E. 1101.

³ *Riehl v. San Jose*, 101 Cal. 442, 35 Pac. 1013; *Kundinger v. Saginaw*, 132 Mich. 395, 93 N. W. 914; *Elliott v. Minneapolis*, 59 Minn. 111, 60 N. W. 1081; *Warren v. Barber A. P. Co.*, 115 Mo. 572, 22 S. W. 490; *Walter v. McClellan*, 113 N. Y. App. Div. 295, 190 N. Y. 505, 83 N. E. 1133; *Terrell v. Strong*, 14 Misc. 258; *Schefbauer v. Bd. of Kearney Tp.*, 57 N. J. L. 588, 31 Atl. 454; *Oakley v. Atlantic City*, 63 N. J. L. 127, 44 Atl. 651; *Ryan v. Paterson*, 66 N. J. L. 533, 49 Atl. 587; *North Yakima v. Scudder*, 41 Wash. 15, 82 Pac. 1022; *Waco v. Chamberlain*, 92 Tex. 207, 47 S. W. 527.

⁴ *Erving v. Mayor*, 131 N. Y. 133, 29 N. E. 1101; *Anderson v. Bd. &c. St. Louis P. S.*, 122 Mo. 61, 27 S. W. 610.

there is no contract until the writing is signed and executed, and no claim or responsibility enforceable against the public body.¹ If the offer and acceptance as shown by the minutes of the public body are not intended to constitute a contract until a formal writing is signed, the acceptance is not complete and the contract will not bind until such written instrument is executed.² So where by law no contract exists except where the contract is signed by a named public official, until he signs the acceptance is incomplete.³ If the satisfactory testing of a machine purchased is made the basis of an offer there must be further action before the contract will be complete.⁴ The minds of the parties must of course meet and the contract they meet upon must not be such a one as is invalid because of the failure to perform some condition precedent to the exercise of the power to contract, such as the making of a prior appropriation.⁵ Acceptance or even performance cannot make such a contract valid.⁶ So a conditional award may not be made depending upon the making of an appropriation by some other board or body.⁷ But when an award has once been made the public body have no discretion to refuse to execute the contract. The rights of the parties then become fixed, and the power to cancel the award or reject the bids does not exist. The obligation of the contract made cannot thus be impaired at the option of one of the contracting parties. After a public body notifies a bidder that his

¹ *Smart v. Philadelphia*, 205 Pa. St. 329, 54 Atl. 1025.

² *Santa Rosa Lighting Co. v. Woodward*, 119 Cal. 30, 50 Pac. 1025.

³ *Press Pub. Co. v. Pittsburgh*, 207 Pa. St. 623, 57 Atl. 75.

⁴ *Fleming Mfg. Co. v. Franklin*, 103 N. W. (Iowa) 997.

⁵ *Hinkle v. Philadelphia*, 214 Pa. St. 126, 63 Atl. 590; *Rieser Co., Inc. v. New York*, 84 Misc. 69; *Williams v. New York*, 118 N. Y. App. Div. 756, 192 N. Y. 541, 84 N. E. 1123.

⁶ *Wadsworth v. Bd. of Superv's*, 217 N. Y. 484, 490, 112 N. E. 161; *Hart v. New York*, 201 N. Y. 45, 55, 94 N. E. 219.

⁷ *Williams v. New York*, 118 App. Div. 756, 192 N. Y. 541, 84 N. E. 1123.

bid is the lowest and has been accepted and that a contract will be executed with him, it owes him the legal duty to execute the contract, and if it refuses to perform such duty the successful bidder may recover his damages.¹ The attempt by the head of department to reject all bids and rescind a contract after it has been awarded, because the financial head of the city has not certified that there is an appropriation available and applicable to the contract is of no avail, if in fact the fund exists and certification was not had merely because the contract was not presented.² And where the public body after it has given notice of an award attempts to reject all bids and readvertise, the successful bidder, by accepting a return of his deposit, does not waive his right to insist upon performance of the obligation which the public body incurred by notice of award.³ The acceptance of the offer contained in the advertising for bids must be unconditional. If it be, upon condition that a bond be given there can be no mutual assent of the parties and no binding contract until that condition is satisfied.⁴

§ 144. The Same—Acceptance—Where Contract is Made by Ordinance.

A public contract made by ordinance or resolution of the governing body of a municipality is complete upon acceptance and binds both parties.⁵

¹ *Lynch v. New York*, 2 N. Y. App. Div. 213; *Pennell v. New York*, 17 *Id.* 455; *Beckwith v. New York*, 121 N. Y. App. Div. 462; *Safety Insulated W. & C. Co. v. Baltimore*, 66 Fed. 140.

² *Beckwith v. New York*, *supra*.

³ *Lynch v. New York*, *supra*.

⁴ *Howard v. Maine Industrial School*, 78 Me. 230, 3 Atl. 657.

⁵ *Curtis v. Portsmouth*, 67 N. H. 506, 39 Atl. 439; *Hunneman v. Grafton*, 10 Metc. (Mass.) 454; *Indianapolis v. Indianapolis G. Co.*, 66 Ind. 396; *Argus Co. v. Albany*, 55 N. Y. 495; *People v. San Francisco*, 27 Cal. 655.

§ 145. The Same—Approval by Officials.

In some instances it is essential where a contract is entered into by one official that there shall be, before the contract can be effective, an approval by some other official. This may take the form of a certification by the financial head that there is a fund in existence, or an approval by the corporation counsel of the contract as to form.¹ Where a statute provides that no contract thereafter made shall be binding or of any force unless the comptroller shall indorse thereon his certificate that there remains unexpended and unapplied, a balance of the appropriation or fund applicable thereto sufficient to pay the estimated expense of executing such contract as certified by the officer making the same, these provisions do not permit a head of department to rescind the contract in a case where the certificate was not made, because he never presented the contract to the comptroller for his signature and attempted to reject all bids after awarding the contract,² as long as such fund in fact existed.³ The failure to obtain such an approval would be fatal to any contract intended to be carried out. Such language admits of no escape from this conclusion; but the true reason underlying the result reached was because the official by rejecting all bids put beyond his power every further step provided by law to be taken, and the rights of the parties then became fixed and gave a right of recovery.⁴ Where a statute expressly requires the approval by a superior officer when the contract is entered into by a subordinate officer, without such approval a contract can-

¹ Sec. 149, Greater N. Y. Charter.

² *Beckwith v. New York*, 121 N. Y. App. Div. 462.

³ *Beckwith v. New York*, *supra*.

⁴ *Beckwith v. New York*, *supra*, and cases cited.

not become binding and effective.¹ If in the meantime pending approval a contractor undertakes the work and the work is subsequently stopped he cannot recover the loss of profits for the suspension,² or if he does the work and the approval is not given he may have no recovery.³ There is authority, however, that approval may exist by implication or acquiescence.⁴

§ 146. The Same—Necessity of Prior Appropriation.

The requirement in a statute that an appropriation must exist before public bodies shall make a contract is mandatory and a contract entered into without such appropriation is void and admits of no recovery.⁵ No implied contract can be sustained in the face of the express and imperative provisions of such statutes.⁶ If in fact an appropriation or fund existed at the time the contract was made, the fact that the fund was subsequently exhausted will not

¹ *Monroe v. U. S.*, 184 U. S. 524; *Johnston v. Philadelphia*, 113 Fed. 40; *Cathel v. U. S.*, 46 Ct. Cl. 368; *Little Falls Knitting Mills Co. v. U. S.*, 44 Ct. Cl. 1; *Thompson v. U. S.*, 9 Ct. Cl. 187; *U. S. R. S.*, § 3744, Comp. Stat. § 6895.

² *Darragh v. U. S.*, 33 Ct. Cl. 377.

³ *Monroe v. U. S.*, *supra*.

⁴ *Wilder v. U. S.*, 5 Ct. Cl. 468; *Ford v. U. S.*, 17 Ct. Cl. 60; *Reeside v. U. S.*, 2 Ct. Cl. 1, s. c. 7 Ct. Cl. 82.

⁵ *Hilliard v. Bunker*, 68 Ark. 340, 58 S. W. 362; *Toomey v. Bridgeport*, 79 Conn. 229, 64 Atl. 215; *May v. Chicago*, 222 Ill. 595, 78 N. E. 912; *May v. Gloucester*, 174 Mass. 583, 55 N. E. 465; *Green v. Everett*, 179 Mass. 147, 60 N. E. 490; *Bd. of Water Commr's v. Commr's*, 146 Mich. 459, 85 N. W. 1132; *Williams v. New York*, 118 N. Y. App. Div. 756, 192 N. Y. 541, 84 N. E. 1123; *Dady v. New York*, 65 Misc. 382, 148 N. Y. App. Div. 956; *Roberts v. Fargo*, 10 N. D. 230, 86 N. W. 726; *Clark v. Portsmouth*, 68 N. H. 263, 44 Atl. 388; *Kearney v. Downing*, 59 Neb. 549, 81 N. W. 509; *Pryor v. Kansas City*, 153 Mo. 135, 54 S. W. 499; *Tennant v. Crocker*, 85 Mich. 328, 48 N. W. 577; *Findlay v. Pendleton*, 62 Ohio St. 80, 56 N. E. 649; *Hinkle v. Philadelphia*, 214 Pa. St. 26, 63 Atl. 590; *Indianapolis v. Wann*, 144 Ind. 175, 42 N. E. 901; *McNeal v. Waco*, 89 Tex. 83, 33 S. W. 322; *Bradley v. U. S.*, 98 U. S. 104, 25 L. Ed. 105, aff'g 13 Ct. Cl. 166; *Hooe v. U. S.*, 218 U. S. 322, 54 L. Ed. 1055, aff'g 43 Ct. Cl. 245.

⁶ *Hooe v. U. S.*, *supra*; *U. S. v. McDougall*, 121 U. S. 89, 30 L. Ed. 861, aff'g 21 Ct. Cl. 511.

defeat a recovery,¹ as a contractor cannot be bound to know at his peril the state of the treasury as to its general appropriations or whether there is or will be on hand a balance to pay him.² A contractor has the right to rely upon the presumption that the head of a department is acting within the prescribed limits of his authority.³ But if the appropriation is made for a single specific purpose or work the contractor is bound to know the amount and keep within it as he will not be permitted a recovery beyond it.⁴ If a contract obligation exceeds the constitutional debt limit no recovery can be had against the public body for the breach of such a contract.⁵ When the statute or act which authorizes the work places no limit on the amount to be expended and the cost of the contract and extra work exceeds the appropriation, a recovery may be had.⁶ An award of a contract conditioned upon some other board or body making an appropriation or an additional appropriation is invalid. The appropriation must precede the contract in point of existence.⁷ So when an appropriation for only part of the cost of a contract exists, an agreement to enter into a contract to complete the work, when requested to do so, on condition that a further appropriation be made, is void.⁸ Where limitations on amount of

¹ *Chicago v. Berger*, 100 Ill. App. 158; *Dougherty v. U. S.*, 18 Ct. Cl. 496; *Leavitt v. U. S.*, 34 Fed. 623; *Van Dolsen v. Board of Education*, 162 N. Y. 446, 56 N. E. 990.

² *Dougherty v. U. S.*, 18 Ct. Cl. 496. See *Louisville v. Gosnel*, 61 S. W. (Ky.) 476.

³ *Leavitt v. U. S.*, 34 Fed. 623.

⁴ *Curtis v. U. S.*, 2 Ct. Cl. 144, 152; *Trenton Co. v. U. S.*, 12 Ct. Cl. 147; *Dougherty v. U. S.*, 18 Ct. Cl. 496; *O'Brien v. Mayor*, 139 N. Y. 543, 35 N. E. 323.

⁵ *Dhrew v. Altoona*, 121 Pa. St. 401, 15 Atl. 636.

⁶ *Grant v. U. S.*, 5 Ct. Cl. 71.

⁷ *Williams v. New York*, 118 N. Y. App. Div. 756, 192 N. Y. 541, 84 N. E. 1123; *Johnston v. Philadelphia*, 113 Fed. 40.

⁸ *Johnston v. Philadelphia*, *supra*.

expenditure exist to the effect that beyond a certain amount, contracts may not be made unless in writing and after advertisement for proposals, or that they must be authorized by the council or by a majority vote of the electors resident in the municipality, the public body, board or officials who have the contract in charge may not render their acts valid and defeat the purpose of the statute by dividing the contract price into several parts through repeated purchases. The limits of authority may not be avoided by splitting up the time of the use of goods or things or the amounts or numbers of purchases.¹ But recovery may be had for value of goods or things hired or purchased up to the amount limited for which a valid contract could have been made, but not beyond it.²

¹ *Walton v. Mayor*, 26 N. Y. App. Div. 76; *May v. Gloucester*, 174 Mass. 583, 55 N. E. 465; *Fire Exting. Mfg. Co. v. Perry*, 8 Okla. 429, 58 Pac. 635.

² *May v. Gloucester*, *supra*. See § 130, *ante*.

CHAPTER XXII

REJECTION OF BIDS—REMEDY OF LOWEST BIDDER— RELETTING

§ 147. Remedy of Lowest Bidder Where No Award is Made.

If the right to reject bids is conferred by statute upon the public body or the advertisement reserves such right, the public body may reject all bids, but the exercise of such power must be in good faith, with moral honesty and not arbitrary.¹ Even if such right is not reserved or saved in any fashion the public authorities may in the public interest reject all bids.² Or if there be no statutory objection the award may be made in good faith to one not the lowest bidder.³ As stated before this award is a judicial act, the exercise of a discretion vested by law in certain administrative officers, and the exercise of this discretion and judgment cannot be controlled by mandamus so as to compel the execution of a contract.⁴ If the public body

¹ *People ex rel. Assyrian A. Co. v. Kent*, 160 Ill. 655, 43 N. E. 760; *McGovern v. Trenton Bd. of Public Wks.*, 57 N. J. L. 580, 31 Atl. 613; *People v. Troy*, 78 N. Y. 33; *Bradley v. Van Wyck*, 65 N. Y. App. Div. 293; *People ex rel. Shay v. McCormack*, 167 *Id.* 854.

² *Yarnold v. Lawrence*, 15 Kan. 103; *Trapp v. Newport*, 115 Ky. 840, 74 S. W. 1109; *Walsh v. New York*, 113 N. Y. 142, 20 N. E. 825; *Erving v. New York*, 131 N. Y. 133, 29 N. E. 1101; *Chippewa B. Co. v. Durand*, 122 Wis. 85, 99 N. W. 603; *Colorado Pav. Co. v. Murphy*, 78 Fed. 28.

³ *Bradley v. Van Wyck*, 65 N. Y. App. Div. 300.

⁴ *People ex rel. Shay v. McCormack*, *supra*; *People ex rel. Francis v. Comm. Council of Troy*, 78 N. Y. 33; *People ex rel. Lunney v. Campbell*, 72 N. Y. 496; *State ex rel. Walton v. Hermann*, 63 Ohio St. 440, 59 N. E. 104; *Johnson v. Sanitary Dist.*, 163 Ill. 285, 45 N. E. 213; *Talbot Pav. Co. v. Detroit*, 91 Mich. 262, 51 N. W. 933; *Capital Print Co. v. Hoey*, 124 N. C. 767, 33 S. E. 160; *Amer. Pav. Co. v. Wagner*, 139 Pa. 623, 21 Atl. 160; *Molloy v. New Rochelle*, 198 N. Y. 402, 92 N. E. 94.

makes an award to one who was not the lowest bidder, rejecting the latter's bid in violation of the statute or charter provisions, this action will not give a cause of action to the person making the lowest bid for damages for failure to award the contract to him. In such a case there is no contractual relation, since the contractor's bid was never accepted. Therefore such an action cannot be sustained as upon contract. Furthermore, since these statutes are not enacted for the benefit of the bidder or of the unsuccessful bidder, but for the benefit of public taxpayers, they cannot recover by virtue of the statute.¹ The courts will not, where bids are rejected, attempt to control the discretion of public officials or bodies by judicial revision, but will leave the exercise of discretion to those in whom by law it is vested. But where the public body acts to make an award, and the statute requires that it be made to the lowest bidder, the award to one who is not the lowest bidder is not the exercise of any discretion, but is made in disobedience to law. The rejection of all bids might be a judicial act. The award to one in violation of law is not. In such case there is no discretion but to follow the law, and where the command of the statute is disregarded and disobeyed the courts will compel obedience to it by mandamus provided parties act in time and before the contract awarded to another is completed. It is a legal discretion and not a personal discretion which is vested in public bodies in such circumstances.² When

¹ *Molloy v. New Rochelle*, 123 App. Div. 642, 198 N. Y. 402, 92 N. E. 94; *Palmer v. Haverhill*, 98 Mass. 487; *Talbot Pav. Co. v. Detroit*, 109 Mich. 657, 67 N. W. 979; *Beckwith v. New York*, 121 N. Y. App. Div. 462.

² *Talbot Pav. Co. v. Detroit*, 109 Mich. 657, 67 N. W. 979, 91 Mich. 262, 51 N. W. 933; *Borem v. Comm'rs Darke County*, 21 Ohio St. 311; *Quare Walsh v. Mayor*, 113 N. Y. 142, 20 N. E. 825; *People ex rel. Coughlin v. Gleason*, 121 N. Y. 631, 25 N. E. 4; *Molloy v. New Rochelle*, *supra*.

the statute makes the measure of power an award to the lowest bidder, both power and discretion are limited accordingly, but in such case the public body may in good faith and for the public interest make no award. In such a situation, although it might have no authority to make any award to any other bidder, it cannot be forced by court interference to make the award to the lowest bidder.¹ Even where the statute or charter gives to the public body the choice of a bidder and authority to make the award to the one who is the lowest responsible bidder or the lowest and best bidder, or the most favorable bidder, the powers thus vested call for a judicial determination and they may not arbitrarily reject the lowest and accept a higher bid.² In order to give its action any legal effect it must in the exercise of its authority make a determination based upon facts. An arbitrary determination without any facts justifying it cannot have the effect of a judicial determination, but is a clear violation of law.³ Public officers in reaching a proper decision as to which of the contractors measure up to these varying standards of bidders have the right in making the judicial determination called for, to consider their capacity and ability to perform the work, their financial responsibility, their skill and integrity and similar qualifications. It is by a consideration of these that they are to exercise their jurisdiction and determine who is the best lowest bidder, the most favor-

¹ *Rice v. Bd. of Town of Haywards*, 107 Cal. 398, 40 Pac. 551; *Anderson v. Bd., etc., of St. Louis Pub. Schools*, 122 Mo. 61, 27 S. W. 610; *State ex rel. Peo. L. Co. v. Holt*, 132 Wis. 131, 111 N. W. 1106; *State v. New Orleans*, 48 La. Ann. 643, 19 So. 690; *Walsh v. Mayor*, *supra*.

² *People ex rel. Coughlin v. Gleason*, *supra*; *Gilmore v. Utica*, 131 N. Y. 26, 29 N. E. 841; *Faist v. Hoboken*, 72 N. J. L. 361, 60 Atl. 1120; *Berry v. Tacoma*, 12 Wash. 3, 40 Pac. 414; *Trapp v. Newport*, *supra*; *Gunning Gravel Co. v. New Orleans*, 45 La. Ann. 911, 13 So. 182.

³ *People ex rel. Coughlin v. Gleason*, *supra*; *Murray v. Bayonne*, 73 N. J. L. 313, 63 Atl. 81.

able or most responsible lowest bidder.¹ If these and other facts are considered and no fraud is shown, and there is no abuse of power, the action of the public body is final, and the exercise by it of the discretion vested in it by law may not be interfered with or usurped by the courts.²

§ 148. Remedy of Lowest Bidder where Award is Made but Public Body Refuses to Execute Contract—Mandamus to Compel Execution.

Sometimes in public contract cases it appears that a prospective contractor is the lowest bidder for a contract under an advertisement for proposals, that his bid has been accepted and the contract has been awarded to him, and that he has furnished the security required by law and has conformed to the other provisions of law upon the subject. These circumstances make out a bidder's clear legal right to the contract. Even if the proceedings are all regular and conducted according to law, and the bidder has in all respects conformed to provisions and requirements of the advertisement and the charter, he may not have a writ of mandamus to compel the execution of a contract to him.³ The reason for this rule is that he has a right of action against the public body for all damages which he has sustained by reason of the refusal to execute

¹ *Gilmore v. Utica*, *supra*; *Inge v. Bd. of Pub. Wks.*, 135 Ala. 187, 33 So. 678; *Madison v. Baltimore Harbor Bd.*, 76 Md. 395, 25 Atl. 337; *State v. Hermann*, 62 Ohio St. 440, 59 N. E. 104; *Philadelphia v. Pemberton*, 207 Pa. St. 814, 57 Atl. 516.

² *Johnson v. Chicago San. Dist.*, 163 Ill. 285, 45 N. E. 213; *Nelson v. New York*, 131 N. Y. 4, 29 N. E. 814; *Madison v. Harbor Bd.*, *supra*; *State v. Hermann*, 63 Ohio St. 440, 59 N. E. 104; *Peckham v. Watsonville*, 138 Cal. 242, 71 Pac. 169; *Barber A. P. Co. v. Trenton*, 74 N. J. L. 430, 65 Atl. 873.

³ *People ex rel. Lunney v. Campbell*, 72 N. Y. 496; *People ex rel. Dowdney v. Thompson*, 99 N. Y. 641, 1 N. E. 542; *Molloy v. New Rochelle*, 198 N. Y. 402, 92 N. E. 94; *People ex rel. Buffalo Pav. Co. v. Mooney*, 4 N. Y. App. Div. 557; *People ex rel. Ajas v. Bd. of Educ.*, 104 *Id.* 162; *People ex rel. Fisher v. Lennon*, 147 *Id.* 640, 206 N. Y. 691, 99 N. E. 1115.

and carry out the contract.¹ Public bodies possess the same legal right which private persons possess to violate, abandon or renounce their contracts upon the usual terms of compensation for damages which the law recognizes and allows.² This right exists subject to the rare exception where specific performance might be allowed in an appropriate case. This right to pay damages rather than render performance could be urged as a further reason for refusing mandamus in such cases. It is said, however, that the matter is one resting in the sound discretion of the court to which the application is addressed to grant or refuse mandamus under the circumstances and that the exercise of such discretion is not subject to review.³ In the cases where an award is made to one bidder and there is a refusal to execute any contract with any bidder, the public body must be left free under the foregoing principles to pay damages, and the determination of public officials that this is for the best interests of the public body should not be interfered with by the courts. If, however, the withholding or granting of mandamus rests in discretion, it would seem the court should exercise its discretion against public officials who have no option under a statute but to make an award to the lowest bidder. When they undertake to violate that statute and make an award to some one other than the lowest bidder, the court's discretion should be exercised against officials who possess no discretion but are violating the law. This seems to be the modern tendency.⁴

¹ *Lynch v. Mayor*, 2 N. Y. App. Div. 213; *Pennell v. Mayor*, 17 *Id.* 455; *Danolds v. State*, 89 N. Y. 36, 42 Am. Rep. 277; *Lord v. Thomas*, 64 N. Y. 107.

² *Lord v. Thomas*, *supra*; *Danolds v. State*, *supra*.

³ *People ex rel. Lunney v. Campbell*, *supra*.

⁴ *Molloy v. New Rochelle*, 198 N. Y. 402, 92 N. E. 94 (*Quære*); *Talbot Pav. Co. v. Detroit*, 109 Mich. 657, 67 N. W. 979, 91 Mich. 262, 51 N. W. 933; *Boren v. Comm'rs Darke County*, 21 Ohio St. 311.

§ 149. **Rights of Unsuccessful Bidder.**

The provisions of the statutes relating to the award of public contracts are for the benefit of the property owners and taxpayers of the public body and not in the interest or for the benefit of contractors or bidders for public work. An unsuccessful bidder may not maintain a suit for their violation.¹ Nor may he maintain a taxpayer's action for like reasons, unless he has property that will be injured by the violation of the provisions of law relied on.² He must show that he had an interest in the performance of the duty imposed by statute, and that the duty was imposed for his benefit. Until he does, the courts must withhold their hands.³ Neither can the lowest bidder compel the issue of a writ of mandamus to force public officers to enter into a contract with him.⁴ Nor can he maintain an action at law for damages for their refusal to enter into a contract with him.⁵ For like reasons he has no standing in equity to obtain injunction or other relief.⁶ Where of course a bidder is a taxpayer and is affected as such by a refusal to award a contract or because of an illegal award to another, he may bring a taxpayer's action.⁷ Such an action is, however, an equitable action to be governed by equitable principles,

¹ *Colorado Pav. Co. v. Murphy*, 78 Fed. 28.

² *Idem*.

³ *Idem*.

⁴ *Molloy v. New Rochelle*, 198 N. Y. 402, 409, 92 N. E. 94; *State v. Board of Fond Du Lac*, 24 Wis. 683; *Comm. v. Mitchell*, 82 Pa. St. 343, 350; *Kelly v. Chicago*, 62 Ill. 279; *State v. McGrath*, 91 Mo. 386, 3 S. W. 846; *Madison v. Harbor Board*, 76 Md. 395, 25 Atl. 337; *Colorado Pav. Co. v. Murphy*, *supra*.

⁵ *Molloy v. New Rochelle*, *supra*; *Talbot Pav. Co. v. Detroit*, 109 Mich. 657, 67 N. W. 979; *East River Gaslight Co. v. Donnelly*, 93 N. Y. 557; *Colorado Pav. Co. v. Murphy*, *supra*.

⁶ *Colorado Pav. Co. v. Murphy*, *supra*.

⁷ *Molloy v. New Rochelle*, *supra*; *Nathan v. O'Brien*, 117 N. Y. App. Div. 664. See §§ 147, 148, *ante*.

and equity will not act where the remedy at law is adequate.¹

§ 150. Reletting.

Where statutes require advertising for bids for the construction of public work and the award of the contract to the lowest bidder, if the statute does not in terms cover the reletting of the contract when abandoned, but is silent upon this subject, the public body may relet the contract without competition.² This is especially true where the original contract expressly provides that in case the contractor unnecessarily delays the work, defaults in other ways or abandons it, the public body may complete the same by contract or otherwise at the expense of the contractor.³ In some jurisdictions, however, these statutes are declared to apply to unfinished improvements made so through abandonment by the contractor, and contracts relet without advertisement are held invalid.⁴ But where by the contract the public body is authorized to finish the work as the agent of the contractor and for his account, even if the statute requires readvertising in case of abandonment, it can have no application where the public body itself finishes the work under such provision.⁵ If the statute requires the abandoned work to be relet under advertisement this method must be pursued to create a valid contract. And of course without such a provision where the abandonment is at the time bids are made, the public body would have the right to reject all other

¹ *Southern Leasing Co. v. Ludwig*, 217 N. Y. 100, 103, 111 N. E. 470.

² *Matter of Leeds*, 53 N. Y. 400; *Bass F. & M. Works v. Parke County*, 115 Ind. 234, 17 N. E. 593.

³ *Matter of Leeds*, *supra*; *Simermeyer v. Mayor*, 16 N. Y. App. Div. 445.

⁴ *Chicago v. Hanreddy*, 211 Ill. 24, 71 N. E. 834; *Meuser v. Risdon*, 36 Cal. 239.

⁵ *Simermeyer v. Mayor*, *supra*.

bids and readvertise.¹ On the other hand, the public body may award to the next lowest bidder without readvertising in case the award is not accepted by the contractor, or after acceptance and part performance he abandons the work.² But this power may not be exercised with fraudulent disregard of public rights and a reletting made to one whose bid is higher than other bidders.³

Where the contractor defaults in his contract after some of the work has been performed and after he has earned and been paid certain installment payments, and the public body retains certain percentages of these installments, as security for the faithful performance of the contract, if the contract is relet, in order to hold such retained amounts, the contract as let must be identical with the original contract.⁴ If the contract is relet at a less cost, the resulting saving does not give any benefit to the original contractor.⁵

¹ People *ex rel.* Frost *v.* Foy, 3 Lans. 398; State *ex rel.* Clough *v.* Shelby County, 36 Ohio St. 326; Goss *v.* State Capitol Comm., 11 Wash. 474, 39 Pac. 972; U. S. *ex rel.* Inter. Cont. Co. *v.* Lamont, 155 U. S. 303.

² Chicago San. Dist. *v.* McMahon & Co., 110 Ill. App. 510; Gibson *v.* Owens, 115 Mo. 258, 21 S. W. 1107; Kinsella *v.* Auburn, 54 Hun, 634; State *ex rel.* Xenia M. Co. *v.* Licking Co., 26 Ohio St. 531; *Contra* Twiss *v.* Pt. Huron, 63 Mich. 528, 30 N. W. 177.

³ Mitchell *v.* Milwaukee, 18 Wis. 93.

⁴ Williams *v.* U. S., 28 Ct. Cl. 518; Quinn *v.* U. S., 99 U. S. 30, 25 L. Ed. 269; U. S. *v.* Axman, 234 U. S. 36, 58 L. Ed. 1198, *aff'g* 193 Fed. 644; Dobson *v.* U. S., 31 Ct. Cl. 422.

⁵ *Idem.*

CHAPTER XXIII

STIPULATIONS OF THE CONTRACT

§ 151. Legal Stipulations—Illegal Stipulations.

Public bodies have the right and the duty to insert in public contracts such reasonable stipulations as will tend to serve and protect the public interests and more effectually require the contractor to perform his duty with strictness and fidelity. It is usual to provide for the doing of the work under direction of the public engineer or architect, to whose orders and directions the contractor is subject. The manner of payment in installments is provided upon certificates of such officer, and all rights are reserved under what is usually denominated the estoppel clause until the issuance of a final certificate. It is proper to insert a stipulation reserving the right to annul the contract, change details of the contract or suspend the work. Provision may also be made for the doing of extra work at contract prices, and to add to or reduce the amount of work, and these and similar provisions are uniformly upheld.¹ Provisions requiring a contractor to meet all loss or damage arising out of the nature of the work done and to restore the surface of the street to the condition in which it was found, are valid.² Imposing liability for damages resulting from the negligence of the contractor is proper,

¹ *New York v. Union News Co.*, 222 N. Y. 263, 118 N. E. 635; *U. S. v. McMullen*, 222 U. S. 460, 56 L. Ed. 269; *Matter of Merriam*, 84 N. Y. 596; *Milwaukee v. Raulf*, 164 Wis. 172, 159 N. W. 819; *Brady v. Mayor*, 132 N. Y. 415, 30 N. E. 757; *McManus v. Philadelphia*, 201 Pa. St. 619, 51 Atl. 322; *State ex rel. Bartelt v. Liebes*, 19 Wash. 589, 54 Pac. 26.

² *Diver v. Keokuk Sav. Bk.*, 126 Iowa, 691, 102 N. W. 542.

as is provision that the contractor shall not assign any moneys due under the contract,¹ or shall not assign without the consent of the public body.² A stipulation that all disputes shall be submitted to the decision of a particular person, such as an architect, engineer or other officer, is valid.³ A requirement that a contractor obtain his material from the public body is valid,⁴ although a similar requirement to obtain it by purchase from citizens of the same body has been said to be invalid.⁵

§ 152. Legal Stipulations—Provision for Arbitration.

It is an incident or term of every contract that the parties shall have the right to resort to a court of law for a settlement and adjustment of their disputes. Any provision to the contrary is void because in contradiction to the rest of the contract. Parties cannot contract that the courts shall not have jurisdiction to enforce damages arising on a right of action. They cannot enter into a contract the breach of which gives a cause of action and then deny to the courts the right to hear it. Parties to a contract cannot, therefore, undertake by an independent stipulation or agreement for the settlement and adjustment of all disputes by arbitration and deny jurisdiction to the ordinary tribunals provided by law. They will be permitted, however, by the same agreement which creates an obligation and gives a right of action for its non-

¹ *Hobbs v. McLean*, 117 U. S. 567, 29 L. Ed. 940; *Goodman v. Niblack*, 102 U. S. 556, 26 L. Ed. 229.

² *Burck v. Taylor*, 152 U. S. 634, 38 L. Ed. 578; *Fortunato v. Patten*, 147 N. Y. 277, 41 N. E. 572; *Hackett v. Campbell*, 10 N. Y. App. Div. 523, 159 N. Y. 537, 53 N. E. 1125; *O'Corr v. Little Falls*, 77 N. Y. App. Div. 592, 178 N. Y. 662, 70 N. E. 1104; *Burnett v. Jersey City*, 31 N. J. Eq. 341.

³ *Jones v. New York*, 60 N. Y. App. Div. 161, 174 N. Y. 517, 66 N. E. 1113.

⁴ *Matter of Merriam*, 84 N. Y. 596.

⁵ *Diver v. Keokuk Sav. Bk.*, *supra*.

performance, to qualify the right, by requiring that before a cause of action shall arise certain facts shall be determined or amounts or values ascertained and arrived at, or that a third person must perform specific acts or determine certain questions, and they may make this a condition precedent to suit.¹ Where a stipulation or agreement submits all future controversies to arbitration, whether the rights impaired flow out of the contract or independently of it, as from negligence, such provision is invalid as ousting the courts of jurisdiction.² Agreements to submit all disputes to arbitration on questions of price, value, quantity or damage only, are valid and do not oust the courts. Provisions for arbitration which are indefinite, impracticable and unreasonable will not be sustained.³ Provisions which withdraw all controversies arising under contracts from the courts and submit them to arbitration will not be enforced.⁴ But where it limits the questions to the amount or quantity of work to be paid for, and to all questions relative to fulfillment, it does not offend the rule and the certificate of the engineer in these respects is a necessary precedent fact to a recovery.⁵ In like manner provisions for the settlement of all disputes as to extra work will be upheld, if they merely qualify the right of action by providing a method under which certain facts shall be determined and amounts and values ascertained, as a condition precedent to action. But if their purpose and effect is to oust courts of jurisdiction they will be

¹ *Seward v. Rochester*, 109 N. Y. 164, 16 N. E. 348; *Dhrew v. Altoona*, 121 Pa. St. 401, 15 Atl. 636.

² *Seward v. Rochester*, *supra*.

³ *Des Moines v. Des Moines W. Wks. Co.*, 95 Iowa, 348, 64 N. W. 269.

⁴ *Nat. Cont. Co. v. Hudson Riv. P. Co.*, 192 N. Y. 209, 84 N. E. 965, 170 N. Y. 439, 63 N. E. 450; *Seward v. Rochester*, *supra*.

⁵ *Nat. Cont. Co. v. Hudson River Power Co.*, *supra*.

denied validity.¹ Though a contractor is not bound by the decision of an arbitrator in event of fraud or mistake so gross as to imply bad faith;² and of course the same rule applies in favor of the public body when the acts of the arbitrator establish fraud.³

§ 153. Legal and Illegal Stipulations—Terms which May be Inserted.

The contract may require a contractor to have a proper plant and adequate facilities to do the work⁴ and it may provide that only a contractor who has done similar work will have his bid considered.⁵ It may also provide that in doing the work the contractor shall limit the hours of labor,⁶ and give preference in employment on the work to be performed to citizens of the State.⁷ A provision naming citizens and residents of a municipality as the only kind of labor that may be employed has been declared invalid.⁸ The contract may validly limit liability to pay for the work until there shall be funds in the treasury properly applicable to the public work.⁹ The public body may even without statutory or charter authority insert a clause providing for the withholding of the contract com-

¹ *People ex rel. Rapid Trans. Cons. Co. v. Craven*, 210 N. Y. 443, 104 N. E. 922.

² *Dinsmore v. Livingston County*, 60 Mo. 241.

³ *O'Brien v. Mayor*, 139 N. Y. 543, 35 N. E. 323.

⁴ *Knowles v. New York*, 37 Misc. 195, 74 App. Div. 632, 176 N. Y. 430, 68 N. E. 860.

⁵ *Nathan v. O'Brien*, 117 N. Y. App. Div. 664.

⁶ *Medina v. Dingleline*, 211 N. Y. 24, 104 N. E. 1118; *People ex rel. v. Coler*, 166 N. Y. 1, 59 N. E. 716; *Cleveland v. Clement Bros. Cons. Co.*, 67 Ohio St. 197, 65 N. E. 885; *Re Dalton*, 61 Kan. 257, 59 Pac. 336; *Re Broad*, 36 Wash. 449, 78 Pac. 1004, 70 L. R. A. 1011; *Opinion of Justices*, 208 Mass. 619, 94 N. E. 1044; *Keefe v. People*, 37 Colo. 317, 87 Pac. 791.

⁷ *People v. Crane*, 214 N. Y. 154, 108 N. E. 427.

⁸ *Dyer v. Keokuk Sav. Bk.*, 126 Iowa, 691, 102 N. W. 542; *State v. Paterson*, 66 N. J. L. 129, 48 Atl. 589.

⁹ *Kransbein v. Rochester*, 76 N. Y. App. Div. 494, and cases cited.

pensation until laborers and material are paid.¹ And without like authority it may provide that, if the grades are changed during the process of the work, the contractor shall conform to the altered grade at the prices fixed so far as they apply, and such provision is not violative of the competitive bidding statute requiring a letting to the lowest bidder.² An agreement that the engineer or architect shall determine the quality or fitness of material is valid.³ A provision that the price for laying sidewalks shall be uniform irrespective of location will be upheld.⁴ Provision for payment of the prevailing rate of wages to those employed is valid,⁵ although prior to the constitutional amendment upon the subject similar provisions were held invalid as being in violation of the Constitution.⁶ A requirement that laborers shall be paid in cash and not in store orders is valid when inserted by virtue of a statute.⁷ A contract which reserves a right to a water company to revoke its offer of free water to a public body whenever it should see proper to do so is valid, and when exercised will require payment for water thereafter used.⁸

Any stipulation which restricts the general rights of the public officials to contract, and in so doing excludes all persons not of a certain designated class is invalid, espe-

¹ State *ex rel.* Bartelt *v.* Liebes, 19 Wash. 589, 54 Pac. 26.

² Matter of Blodgett, 27 Hun, 12.

³ Barlow *v.* U. S., 35 Ct. Cl. 514.

⁴ Galveston *v.* Heard, 54 Tex. 420.

⁵ *Peo. v. Coler*, 166 N. Y. 1, 59 N. E. 716; *Bohnen v. Metz*, 126 N. Y. App. Div. 807, 193 N. Y. 676, 87 N. E. 1115; *Ewen v. Thompson Starrett Co.*, 208 N. Y. 245, 101 N. E. 894.

⁶ *People v. Orange County Road Cons. Co.*, 175 N. Y. 84, 67 N. E. 129; *People v. Grout*, 179 N. Y. 417, 72 N. E. 464.

⁷ *People ex rel. North v. Featherstonhaugh*, 172 N. Y. 112, 64 N. E. 802.

⁸ *Spring Brook W. Co. v. Pittston*, 203 Pa. St. 223, 52 Atl. 249.

cially where it tends to confer a monopoly and to impose an additional burden upon the taxpayers.¹ Contracts which provide that all loss or damage arising from the nature of the work done shall be sustained by the contractor are invalid as tending to increase the cost of the work.²

§ 154. Provisions as to the Qualifications of Those Employed on Public Work—Hours of Work, etc.

A provision in a public contract that the contractor shall prefer in employment, citizens of the State or of the United States will be sustained.³ Indeed, the courts have declared that all persons engaged on public works are in a vital sense in the service of the State, and public bodies may therefore exclude aliens from employment on public work, either in its own employment or that of independent contractors, and it may lawfully and without invading constitutional limitations provide by law that none but citizens shall be employed on public work.⁴ A provision in the contract prohibiting the employment of convict labor invalidates the contract.⁵ A stipulation that a certain number of hours shall constitute a day's work is invalid;⁶ and it is said that where it increases the cost of

¹ State *ex rel. v. Toole*, 26 Mont. 22, 66 Pac. 496; *Paterson Chronicle v. Paterson*, 66 N. J. L. 129, 48 Atl. 589; *Atlanta v. Stein*, 111 Ga. 789, 36 S. E. 932.

² *Blochman v. Spreckels*, 135 Cal. 662, 67 Pac. 1061, 57 L. R. A. 213; *Inge v. Bd. of Public Wks.*, 135 Ala. 187, 33 So. 678; *Stansbury v. Poindexter*, 154 Cal. 709, 99 Pac. 182; *City Street Imp. Co. v. Marysville*, 155 Cal. 419, 101 Pac. 308.

³ *U. S. v. Realty Co.*, 163 U. S. 427, 41 L. Ed. 215.

⁴ *Atkin v. Kansas*, 191 U. S. 207, 48 L. Ed. 148; *Ellis v. U. S.*, 206 U. S. 246, 51 L. Ed. 1047; *People v. Crane*, 214 N. Y. 154, 108 N. E. 427; *Givins v. People (Ill.)*, 62 N. E. 534; *Philadelphia v. McLinden*, 205 Pa. 172, 54 Atl. 719; *Contra, Inge v. Bd. of Pub. Wks.*, 135 Ala. 187, 33 So. 678; *Glover v. People*, 201 Ill. 545, 66 N. E. 820; *Chicago v. Hulbert*, 205 Ill. 346, 68 N. E. 786.

⁵ *Inge v. Bd. of Public Wks.*, *supra*.

⁶ *People v. Orange County R. Cons. Co.*, 175 N. Y. 84, 67 N. E. 129; *Glover*

the work, and was not mentioned in the advertisement, and therefore violates the provisions of the statute requiring letting to the lowest bidder, it is invalid.¹ But if it did not affect the bid the clause will not be considered to defeat an assessment.² So with a clause which provided that no Chinamen should be employed and that eight hours should constitute a day's work.³ Any stipulations which are unauthorized, either because not mentioned in the specifications or because illegally imposed upon the contractor, and which tend to increase the cost of the work, violate the statutes requiring the work to be let to the lowest bidder, and are invalid.⁴ But when provisions of this sort are inserted in a contract because of the peremptory language of a statute, if the statute is invalid, they have no obligatory or binding force and it is presumed were so considered by the parties, and were disregarded in the making up of the estimate, so that the contract price was not influenced or increased thereby.⁵ A requirement that only union labor shall be employed upon a public contract is invalid as in violation of constitutional limitations.⁶ So a provision requiring a union label on all public printing is invalid.⁷ A provision of an ordinance

v. People, 201 Ill. 545, 66 N. E. 820. See *Peo. ex rel. Williams Eng. Co. v. Metz*, 193 N. Y. 148.

¹ *De Wolf v. People*, 202 Ill. 73, 66 N. E. 868.

² *Hamilton v. People*, 194 Ill. 133, 62 N. E. 533.

³ *Hellman v. Shoulters*, 114 Cal. 136, 44 Pac. 915.

⁴ *Anderson v. Fuller*, 51 Fla. 380, 41 So. 684; *Dickinson v. Poughkeepsie*, 75 N. Y. 65; *Allen v. Labsap*, 188 Mo. 692, 87 S. W. 926.

⁵ *People v. Coler*, 166 N. Y. 1, 59 N. E. 716; *Cleveland v. Clements Bros. Const. Co.*, 67 Ohio St. 197, 65 N. E. 885; *People v. Featherstonhaugh*, 172 N. Y. 112, 64 N. E. 802; *Doyle v. People*, 207 Ill. 75, 69 N. E. 639; *Cason v. Lebanon*, 153 Ind. 567, 55 N. E. 768.

⁶ *State ex rel. v. Toole*, 26 Mont. 22, 66 Pac. 496; *Lewis v. Detroit Bd. of Education*, 139 Mich. 306, 102 N. W. 756; *Fiske v. People*, 188 Ill. 206, 58 N. E. 985; *Adams v. Brennan*, 177 Ill. 194, 52 N. E. 314.

⁷ *Marshall & Bruce Co. v. Nashville*, 109 Tenn. 495, 71 S. W. 815; *Holden v. Alton*, 179 Ill. 318, 53 N. E. 556.

imposing a minimum wage to be paid for labor upon public work is valid.¹

§ 155. Imposing Liability for Injury to Property—Increasing Cost.

Where a contract provides that a contractor shall be responsible for all loss or damage occasioned by neglect and that he shall assume all risk of damages for all private property along the line of the work, including liabilities which properly rest upon the public body, such a contract is invalid as tending to increase the amount of the bid for the contract, and therefore increase the cost of the work either to the public body or abutting property owners.² A stipulation against the employment of alien or convict labor, is a restriction upon a contractor which naturally tends to cause him to increase his price and such a provision invalidates the contract.³

§ 156. Stipulation to Maintain Pavement During Period of Years.

Under the general system for improvement of streets with pavements, the original cost of paving is paid as a local improvement and is borne by the adjoining owners within an area of assessment fixed for that purpose, and the further cost of maintaining and repairing the pavement is paid for by the public body at large by general taxation. In their effort to get the best pavement possible and to enforce the promises of contractors which precede the letting of every contract as to the durability of their

¹ *Mallette v. Spokane*, 77 Wash. 205, 137 Pac. 496; *Clark v. State*, 142 N. Y. 101, 36 N. E. 817.

² *Inge v. Bd. of Public Works*, 135 Ala. 187, 33 So. 678; *Blochman v. Spreckels*, 135 Cal. 662, 67 Pac. 1061, 57 L. R. A. 213; *City Street Imp. Co. v. Marysville*, 155 Cal. 419, 101 Pac. 308.

³ *Inge v. Bd. of Public Works*, *supra*. See *Holden v. Alton*, 179 Ill. 323, 53 N. E. 566.

particular pavement, public bodies usually provide by a stipulation in the contract that the contractor will guarantee his work during a period of years, and that in case the pavement fails to conform to the guaranty he will make such repairs as are needed during such period. These stipulations have been a fruitful source of controversy and their validity has been questioned as in conflict with the various charter and statutory provisions for meeting the cost by this dual method of local taxation for construction and general taxation for maintenance. It is contended that the insertion of such a provision for maintenance of the pavement during a period of years after its acceptance by the public body invalidates the contract because it tends to increase the contract cost and thereby imposes upon the property in the locality the cost of repairs in violation of these charter or statute provisions which divide the cost of construction and maintenance by putting the former on the locality and the latter upon the general public body. By the weight of authority it has been declared that these provisions in contracts are in the nature of a guaranty of the quality and character of the work done, and neither violate the statutes distributing the cost between the municipality and the locality nor those which require a letting to the lowest bidder. So long as the time during which the guaranty continues is no longer than the ordinary durability of the pavement when laid with the best workmanship and material, it does not tend to increase the cost and is therefore not in violation of the statutes cited.¹ But the contrary view has been

¹ *People ex rel. North v. Featherstonhaugh*, 172 N. Y. 112, 64 N. E. 802; *O'Keeffe v. New York*, 173 N. Y. 474, 66 N. E. 194; *Latham v. Wilmette*, 168 Ill. 153, 48 N. E. 311; *Cole v. People*, 161 Ill. 16, 43 N. E. 607; *Allen v. Davenport*, 107 Iowa, 90, 101, 77 N. W. 532; *Osborn v. Lyons*, 104 Iowa, 160, 73 N. W. 650; *Hedge v. Des Moines*, 141 Iowa, 4, 119 N. W. 276; *Shank v. Smith*,

taken that such stipulations tend to increase the cost of the work, and therefore contravene the statutes referred to and render the contract invalid.¹

A clause by which the contractor agrees to maintain the pavement in good order for five years after its acceptance, and to make all repairs which may, from any imperfection in the work or material, or from any crumbling or disintegration, become necessary, is a guaranty of the quality of the materials used and the character of the work performed.² And a substantially similar clause for maintenance during eight years has been sustained.³ Where the clause covers decay and disintegration from natural causes, and defects caused by traffic, it conflicts with those provisions of statute or charter which place the expense of repairs and maintenance upon the public body at large and makes the contract void.⁴

§ 157. Effect of Legal and Illegal Stipulations.

Where plans and specifications were consulted by a con-

157 Ind. 401, 61 N. E. 932; *Barber A. P. Co. v. French*, 158 Mo. 534, 58 S. W. 934; *Barber A. P. Co. v. Hezel*, 155 Mo. 391, 56 S. W. 449; *Seaboard Nat. Bk. v. Woesten*, 147 Mo. 467, 48 S. W. 939; *Barber A. P. Co. v. Ullman*, 137 Mo. 543, 38 S. W. 458; *Sedalia v. Smith*, 206 Mo. 346, 104 S. W. 15; *Kansas City v. Hanson*, 60 Kan. 833, 58 Pac. 474; *Wilson v. Trenton*, 60 N. J. L. 394, 38 Atl. 635, 61 N. J. L. 599, 40 Atl. 575; *Robertson v. Omaha*, 55 Neb. 718, 76 N. W. 442; *Bacas v. Adler*, 112 La. 806, 36 So. 739; *McGlynn v. Toledo*, 22 Ohio Cir. Ct. 34; *Allen v. Portland*, 35 Oreg. 420, 58 Pac. 509; *Philadelphia v. Pemberton*, 208 Pa. St. 214, 57 Atl. 516.

¹ *Montgomery v. Barnett*, 149 Ala. 119, 43 So. 92; *Alameda P. Co. v. Pringle*, 130 Cal. 226, 62 Pac. 394, 52 L. R. A. 264; *Excelsior P. Co. v. Leach*, 34 Pac. (Cal.) 116; *Brown v. Jenks*, 98 Cal. 10, 32 Pac. 701; *Gosnell v. Louisville*, 104 Ky. 201, 46 S. W. 722; *Fehler v. Gosnell*, 99 Ky. 380, 35 S. W. 1125; *Portland v. Bitum. Pav. Co.*, 33 Oreg. 307, 52 Pac. 28; *McAllister v. Tacoma*, 9 Wash. 272, 37 Pac. 447, 658; *Boyd v. Milwaukee*, 92 Wis. 456, 66 N. W. 603.

² *Wilson v. Trenton*, *supra*; *Barber A. P. Co. v. Ullman*, *supra*; *Kansas City v. Hanson*, *supra*; *Latham v. Wilmette*, *supra*.

³ *People ex rel. North v. Featherstonhaugh*, *supra*.

⁴ *Schenectady v. Union College*, 66 Hun. 179; *Bradshaw v. Jamestown*, 125 N. Y. App. Div. 86; *Portland v. Bitum. Pav. Co.*, 33 Oreg. 307, 52 Pac. 28; *Brown v. Jenks*, 98 Cal. 10, 32 Pac. 701; *Fehler v. Gosnell*, 99 Ky. 380, 35 S. W. 1125; *Boyd v. Milwaukee*, 92 Wis. 456, 66 N. W. 603.

tractor before he made his bid and an examination of them would disclose apparent discrepancies in them, the contractor is bound by a reasonable provision that if any apparent discrepancies are found between the plans, working drawings and specifications, the decision of the architects as to their fair construction and true intent and meaning shall be binding.¹ Where it provides that after a decision by the architect or engineer a contractor may under protest complete the work under the interpretation given, this leaves the contractor's rights open without impairment.²

§ 158. Covenants Implied by Law—Warranties.

In every contract for the performance of public work there is an implied obligation on the part of the public body to give to its contractor access to the place at which the work is to be performed and reasonable facilities for performing it.³ When, therefore, a public body advertises for bids for the privilege of picking over refuse from its streets at certain public dumps, and the contract grants it for the same dumps, the law will necessarily imply a covenant by the public body to deliver all its refuse gathered from its streets at those dumps, even if exact words to that effect are wanting. Such additional or correlative covenant being intended, the courts will supply it as indispensable to the effectuation of the contract.⁴ Where the public body fails or neglects to acquire a necessary right of way for the work, it fails in its duty to put the contractor in a position to proceed with his work, and is liable the

¹ *Kelly v. Public Schools of Muskegon*, 110 Mich. 529, 68 N. W. 282.

² *Galveston v. Devlin*, 84 Tex. 319, 19 S. W. 395.

³ *New York v. Continental A. Co.*, 163 N. Y. App. Div. 486, aff'd 218 N. Y. 685, 113 N. E. 1052.

⁴ *New York v. Delli Paoli*, 202 N. Y. 18, 94 N. E. 1077.

same as when it fails to furnish a site to the contractor, for breach of an implied warranty in that regard.¹ A warranty that ground is of a specially stable character, or that it is free from quicksand, or of the character referred to in the plans and specifications, will not be implied in the absence of an express stipulation that there is a warranty in favor of the contractor, that the ground selected should be of a defined character, or unless an unavoidable implication to that effect arises. This rule applies even though a plan showing the character of the soil is submitted to the contractor and is considered by him in making his bid, since ordinarily the risk of subsidence of the soil is assumed by the contractor.² And where a contract expressly states that the nature of the underground has not been investigated, and the public body denies any responsibility for its character, but puts upon the contractor all losses resulting on account of the character of the ground or because its nature was different than estimated or expected, no warranty of the character of the soil can be implied.³ In similar regard drawings which show the probable surface of rock do not imply a warranty as to the depth at which rock will be found, in the face of a provision that if its location should be found to differ from that indicated no liability should result and no warranty should be taken.⁴ But positive assertions as to the nature of the work belong to a different category. Upon these a contractor has the right to rely without independent investigations to prove their falsity.⁵ While ordinarily a contractor assumes subsidence

¹ *Ash v. Independence*, 79 Mo. App. 70.

² *Simpson v. U. S.*, 172 U. S. 372, 43 L. Ed. 482, aff'g, 31 Ct. Cl. 217.

³ *Rowe v. Peabody*, 207 Mass. 226, 93 N. E. 604; *Kelly v. New York*, 87 N. Y. App. Div. 299, 180 N. Y. 507, 72 N. E. 1144.

⁴ *Kelly v. New York*, *supra*.

⁵ *Hollerbach v. U. S.*, 233 U. S. 165, 58 L. Ed. 898; *Capital City B. & P. Co.*

of the soil in the particular site upon which he is to erect a structure, and assumes the adequacy of existing systems of drainage in such place where he is working, yet if in the process of constructing a public work such as a dry dock, the public body by contract provision directs the relocation of a sewer in such place and provides the character, dimensions and location of the sewer, the articles of the contract prescribing these import a warranty that if the specifications are complied with the sewer will be adequate, and this implied warranty will not be overcome by general clauses requiring the contractor to examine the site, to check up the plans and to assume responsibility for the work until completion and acceptance.¹ A contractor is not precluded from relying upon such implied warranties because of a statute requiring contracts to be reduced to writing or because of the parol evidence rule.² When in the course of the work unforeseen conditions arise without the fault of either party and are not covered expressly by the terms of the contract, and these render performance of the contract as planned impossible, make necessary substantial changes in the nature and cost of the contract, as well as substantially affect the remaining work, the law reads into the contract an implied condition when it was made that such a contingency will terminate the contract.³

§ 159. Covenants Implied by Law—Warranty of Performance.

The obligation of a contractor who undertakes work is to erect the structure or accomplish the work described in the

v. Des Moines, 136 Iowa, 243, 113 N. W. 835; *U. S. v. Atlantic Dredg. Co.*, 253 U. S. 1, 64 L. Ed. 735; *U. S. v. Smith*, 256 U. S. 11, aff'g 54 Ct. Cl. 119.

¹ *U. S. v. Spearin*, 248 U. S. 132, 63 L. Ed. 166, aff'g 51 Ct. Cl. 155.

² *U. S. v. Spearin*, *supra*.

³ *Kinser Const. Co. v. State* (N. Y. Ct. Cl.), 125 N. Y. Supp. 46, 54.

plans and specifications. If the work or structure does not accomplish the results expected by the public body the loss must fall upon it. There is no implied stipulation, that when the structure is erected or the work accomplished in accordance with the plans and specifications, it will be safe or suitable for the purposes intended, or will accomplish the results expected.¹ When the contractor is bound to build in accordance with the plans and specifications prepared by the public body, the contractor is not responsible for the consequences of defects in them.² If the contractor warrants the sufficiency of his work measured by the plans and specifications, this is not a warranty that the work when finished will accomplish or effect the purposes intended.³ Where the specifications of a bridge provide it to bear stated live loads, and certain trusses become overstrained when subjected to such live loads after construction, but the work is performed strictly in accordance with the specifications, the contractor does not, by agreeing to build according to specifications, warrant, that when erected, the bridge will not be overstrained if subjected to such live loads.⁴ The contractor's agreement merely warrants in such a case that he will comply with the specifications. So where the specifications describe the work contemplated as water-tight, if the specifications cannot effect this result,

¹ *New York v. Penn. Steel Co.*, 206 Fed. 454; *U. S. v. Spearin*, 248 U. S. 132, 63 L. Ed. 166; *Gregory v. U. S.*, 33 Ct. Cl. 434.

² *U. S. v. Spearin*, *supra*; *McKnight Flintie Stone Co. v. Mayor*, 160 N. Y. 72, 54 N. E. 661; *Filbert v. Philadelphia*, 181 Pa. St. 530, 37 Atl. 545; *Bentley v. State*, 73 Wis. 416, 41 N. W. 338; *Dist. of Columbia v. Clephane*, 110 U. S. 212, 28 L. Ed. 122, aff'g 2 Mackey, 155; *Green Riv. A. Co. v. St. Louis*, 188 Mo. 576, 87 S. W. 985; *Gilliam v. Brown*, 116 Cal. 454, 48 Pac. 486; *Penn. Bridge Co. v. New Orleans*, 222 Fed. 737; *Conway Co. v. Chicago*, 274 Ill. 369, 113 N. E. 703.

³ *Harlow v. Homestead*, 194 Pa. St. 57, 45 Atl. 87; *Filbert v. Philadelphia*, 181 Pa. St. 530, 37 Atl. 545; *Lake View v. MacRitchie*, 134 Ill. 203, 25 N. E. 663; *Dwyer v. New York*, 77 N. Y. App. Div. 224.

⁴ *New York v. Penn. Steel Co.*, 206 Fed. 454.

the obligation of the contractor is complete when he complies with the specifications.¹ But an express warranty that a public work when completed will prove satisfactory and accomplish the purposes and objects intended is binding, and the risk that the plans will effect this result is upon the contractor.² If he warrants all of the work to remain in good condition for one year from acceptance, this is a warranty against all defects whatever their origin, and applies alike to insufficiency of materials, unskillfulness of work, as well as to unfitness of plan and design, whether devised by the public body or the contractor. By such a provision the contractor necessarily warrants the sufficiency of the plan and the work to satisfy the result intended.³ A warranty of this sort may be implied from the language of the contract.⁴ But where such a warranty is verbal and was made before the signing of the written contract it cannot be superadded thereto or proved, since it is an integral part of such original contract and not a separate agreement on a matter consistent with the terms of such writing.⁵ Where the public body agrees to furnish suitable plans, drawings and specifications, such language implies an undertaking on the part of the public body that its architect has sufficient learning, experience and skill to properly perform the work required of him, and that the plans, drawings and specifications are suitable and efficient for the purpose designed,⁶ and the risk of sufficiency and efficiency is upon the public body where subsequently the

¹ Dwyer v. New York, *supra*; Harlow v. Homestead, *supra*.

² Lake View v. MacRitchie, *supra*; Shoenberger v. Elgin, 164 Ill. 80, 45 N. E. 434. See Thorn v. Mayor, L. R. 1 App. Cas. 120, aff'g 44 L. J. Exch. 62.

³ Lake View v. MacRitchie, *supra*.

⁴ Shoenberger v. Elgin, 164 Ill. 80, 45 N. E. 434, aff'g 59 Ill. App. 384.

⁵ Hills v. Farmington, 70 Conn. 450, 39 Atl. 795.

⁶ Bentley v. State, *supra*.

structure collapses.¹ Whenever the agreement is not to do a particular thing, but to do it in a particular way and to use the materials specified, as designed by the public body, the risk of effecting its purpose falls upon the public body and no warranty by the contractor of the sufficiency of the plan and specifications to produce the desired result can be implied. The converse warranty in fact arises in the circumstances against the public body.² Indeed, a warranty that work will remain in perfect order and water-proof for a stated period is a warranty as to material and workmanship but not of the plan.³ It has, however, been declared that no warranty would be implied as to the sufficiency of something, which is not the thing contracted for, but a mere means to be employed in the construction of the work, and mentioned in the contract.⁴ So where the State or other public body has warranted the sufficiency of the plan, if the trouble is not with it, but with conditions of the site which were not within such warranty, but which were equally relied upon as sufficient by the parties, the warranty will not apply.⁵ A warranty of design or plan will not, however, be inferred but must be clearly expressed in the contract or as clearly implied from its language.⁶

§ 160. Reserved Right to Make Alterations and Suspend the Work.

A provision, whereby the public body reserves the right,

¹ Bentley v. State, *supra*.

² Kellogg Bridge Co. v. Hamilton, 110 U. S. 108, 28 L. Ed. 86; MacRitchie v. Lake View, 30 Ill. App. 393; Mac Knight Flintie Stone Co. v. Mayor, 160 N. Y. 72.

³ MacKnight F. S. Co. v. Mayor, *supra*.

⁴ Thorn v. Mayor, *supra*.

⁵ Kinser Cons. Co. v. State, 204 N. Y. 381, 97 N. E. 871, *aff'g* 145 N. Y. App. Div. 41.

⁶ Conway Co. v. Chicago, 274 Ill. 369, 113 N. E. 703.

until completion and acceptance of the work, to make such additions to or deductions from the work or changes in the plans and specifications, as may be necessary, is a valid provision, and will authorize the public body in good faith to make the changes provided both in the plans and specifications, and in the work, when necessary, without rendering the contract invalid, and without subjecting the public body to claims for loss of profits, where such is provided.¹ Of course, in the absence of reserved rights of this character, the public body, even though it be the State or the Nation, may not exercise these privileges or powers, as they cannot rescind or suspend contracts, any more than private persons may, without compensation in damages.² Under such a clause the public body has the right, whenever the necessity for changes shall arise, owing to unforeseen conditions or contingencies, to stop the work in whole or in part, change the plans and eliminate such part as proves impossible of accomplishment. This is the function of such a clause, to make provision for contingencies which could not be foreseen by ordinary care and prudence.³ Where accordingly in the course of construction of public work natural conditions of soil unexpectedly appear, and this contingency is not expressly covered by the contract, yet renders performance as planned impossible, and makes necessary substantial changes in the nature and cost of the work, and substantially affects the remaining work, the law will read into the contract an implied condition when it was made that such a contingency will terminate the

¹ *Clark v. Mayor*, 4 N. Y. 338, 342; *Kinser Cons. Co. v. State*, 204 N. Y. 381, 97 N. E. 871, 145 N. Y. App. Div. 481, 125 N. Y. Supp. 46; *U. S. v. McMullen*, 222 U. S. 460, 56 L. Ed. 269.

² *Danolds v. State*, 89 N. Y. 36, 42 Am. Rep. 277; *People ex rel. Graves v. Sohmer*, 207 N. Y. 450, 101 N. E. 164.

³ *Kinser Cons. Co. v. State*, *supra*.

entire contract.¹ The clause will not in every case have such effect. It depends upon whether the conditions amount to a substantial abrogation of the contract or relate only to an insignificant part of the contract. The contract will remain in full force so far as performed and so far as it may be still performed. It will excuse performance only to the extent performance becomes impossible whether it be all or only a part of the remaining work.² This provision places no limitation upon the right to make alterations other than necessity. Necessity is the sole basis and standard for the protection of both parties. It protects the contractor from arbitrary, capricious or unreasonable action by public officers. It guards the public body against unforeseen conditions, which would render the work impossible of performance as originally planned. While the necessity need not be absolute, it must be reasonable, for the law writes the word reasonably before the word necessary in this term of the contract, as unavoidably within the contemplation of the parties, especially where the extent of the work and the expense is enormous.³ Both of the parties are in the same position at the time of discovery of these supervening conditions. Under the law they must both share the responsibilities arising from these conditions, which were not anticipated when the contract was made.⁴ A change from one kind of construction to another, made for no reason but to save expense, and which destroys the essential identity of the thing contracted for, cannot be made or justified and will constitute a breach of the contract.⁵ So where the change in plans is arbitrary, radical

¹ Kinser Cons. Co. v. State, *supra*.

² *Idem*.

³ *Idem*.

⁴ *Idem*.

⁵ National Cont. Co. v. Hudson River W. P. Co., 192 N. Y. 209, 84 N. E. 965.

and subversive of the thing to be done and is made simply because the new construction is cheaper, a breach of contract results.¹ But when changes are made by the public body through its proper agent, and are dictated by impartial judgment and in good faith, they may be made within these limits without liability other than as provided in the contract.² However, a provision of this sort, which gives to a public body the power to direct in good faith changes in the work, will not authorize them to stop the work in an unfinished state and thus arbitrarily annul the contract.³ But while such a rule that such clauses are valid applies ordinarily to public bodies it cannot have application in cases where the letting of public work is controlled by strict statutory or charter limitations requiring the work to be let to the lowest bidder under competitive bids, if the nature and effect of the clause, reserving a general power to change the work and materials, is to interfere with the free competition which the statute requires.⁴

§ 161. Reserved Right to Suspend Work—Who May Suspend Work—Effect.

While these provisions for suspension of the work are valid and enforceable,⁵ they must be properly exercised.⁶ If the power to suspend the work is committed to a particular officer it may not be delegated to or exercised by a subordinate in his department.⁷ Where the contract pro-

¹ *McMaster v. State*, 108 N. Y. 542, 15 N. E. 417.

² *Kingsley v. Brooklyn*, 78 N. Y. 200, 208.

³ *Clark v. New York*, 4 N. Y. 338.

⁴ *Gage v. New York*, 110 N. Y. App. Div. 403.

⁵ *Clark v. Pittsburgh*, 146 Fed. 441, 154 Fed. 464; *Wakefield Cons. Co. v. City of New York*, 157 N. Y. App. Div. 535, 213 N. Y. 633; *Wells Bros. Co. v. U. S.*, 254 U. S. 83, 65 L. Ed. —; *Mechanics Bk. v. New York*, 164 N. Y. App. Div. 128.

⁶ *Clark v. Pittsburgh*, *supra*; *Wakefield Cons. Co. v. New York*, *supra*.

⁷ *Ryan v. New York*, 178 N. Y. App. Div. 181, 189.

vides that the work may be suspended, if it is deemed for the interest of the city without compensation to the contractor, other than an extension of time specified for completion, the remedy thus provided for the consequences of its breach is exclusive.¹ A public body is not authorized, under a clause permitting suspension of the work when deemed for its best interests, to suspend the work merely because it had no appropriation to pay for engineering inspection, which it was bound to furnish, since the power given is not an arbitrary power and may not be so unreasonably exercised against a contractor.² But a plain and unrestricted covenant conferring right of delay without liability will not be treated as meaningless and read out of the contract.³

§ 162. Reserved Right to Annul.

While the validity of clauses which reserve these powers of suspension or annulment is questionable from the viewpoint of mutuality,⁴ they are generally sustained as valid provisions. It is accordingly within the power of public bodies to provide by contract, that it shall have the right, for the best interests of the public body, or for any reason appearing sufficient to them, to suspend the progress of the work or annul the contract altogether, on giving the notice required by the contract, and that they shall have no liability other than to extend the time stated for completion.⁵ But when this right is exercised the public body must keep within the conditions of its exercise as provided in the contract. If it is to be exercised because deemed for

¹ *Mechanics Bk. v. New York*, *supra*.

² *Johnson v. New York*, 191 N. Y. App. Div. 205.

³ *Wells Bros. Co. v. U. S.*, 254 U. S. 83, 65 L. Ed. —.

⁴ *U. S. v. McMullen*, 222 U. S. 460, 56 L. Ed. 269.

⁵ *Harder v. Marion County*, 97 Ind. 455; *Mechanics Bk. v. New York*, 164 N. Y. App. Div. 128.

the best interest of the public body it cannot be exercised arbitrarily or unreasonably.¹ If its exercise must be upon stated notice, the giving of the notice is a condition precedent to a valid exercise of the reservation.² Of course if not otherwise provided the notice must be personal³ and must usually be in writing.⁴ Where this reserved right to annul is exercised, the contractor, whose contract is thus annulled, is entitled to recover from the public body the value of the actual benefits which it has received from the partial performance.⁵ In the absence of evidence to the contrary its action in annulling will be presumed to be in good faith.⁶ The action may not be for money due on the contract, where the action in revoking is improper or unauthorized, but must be for damages for breach of the contract.⁷

¹ *Powers v. Yonkers*, 114 N. Y. 145, 21 N. E. 132; *Wakefield Cons. Co. v. New York*, 157 N. Y. App. Div. 535, 213 N. Y. 633, 107 N. E. 1087; *Smith Cont. Co. v. New York*, 167 N. Y. App. Div. 253; *Johnson v. New York*, 191 N. Y. App. Div. 205; *Newport v. Phillips*, 19 Ky. L. R. 352, 40 S. W. 378.

² *Indianapolis v. Bly*, 39 Ind. 373.

³ *Haldane v. U. S.*, 69 Fed. 819.

⁴ *Erving v. Mayor*, 131 N. Y. 133, 29 N. E. 1101.

⁵ *Lyman v. Lincoln*, 38 Neb. 794, 57 N. W. 531.

⁶ *Powers v. Yonkers*, *supra*; *Newport v. Phillips*, *supra*.

⁷ *Newport v. Phillips*, *supra*.

CHAPTER XXIV

MODIFICATION OF CONTRACT

§ 163. Right to Modify.

A public body has no right to make changes or demand that changes be made or allowed in a contract unless the contract expressly provides for such modification.¹ Of course any contract may be modified by the mutual consent of the parties² and where the contract itself provides that the public body may make modifications and may require the contractor to assent thereto, such right exists.³ But the modification or change can only be made by authorized officials of the public body, to be enforceable.⁴ But the exercise of such a right will not be extended so as to allow the making of radical changes or such as materially alter the character of the work⁵ with-

¹ *Roettinger v. U. S.*, 26 Ct. Cl. 391; *Griffiths v. Chicago San. Dist.*, 174 Ill. App. 100; *Nat. Cont. Co. v. Hudson River W. P. Co.*, 192 N. Y. 209, 84 N. E. 965; *McMaster v. State*, 108 N. Y. 542, 15 N. E. 417.

² *Bradley v. McDonald*, 218 N. Y. 351, 113 N. E. 340; *Smith v. Parkersburg Bd. of Ed.*, 76 W. Va. 239, 85 S. E. 513; *Stephens v. Essex Co. Pk. Commr's*, 143 Fed. 844; *U. S. v. Guerber*, 124 Fed. 823.

³ *Smith v. Chicago San. Dist.*, 108 Ill. App. 69; *Swift v. U. S.*, 14 Ct. Cl. 208; *Connors v. U. S.*, 141 Fed. 16.

⁴ *Bonesteel v. Mayor*, 22 N. Y. 162; *Becker v. New York*, 176 N. Y. 441, 68 N. E. 855; *Hague v. Philadelphia*, 48 Pa. St. 527; *Mott v. Utica*, 114 N. Y. App. Div. 736; *Markey v. Milwaukee*, 76 Wis. 349, 45 N. W. 28; *O'Hara v. New Orleans*, 30 La. Ann. 152; *Chicago v. McKechney*, 205 Ill. 372, 68 N. E. 954; *People ex rel. Hanberg v. Peyton*, 214 Ill. 416, 73 N. E. 770; *Lamson v. Marshall*, 133 Mich. 250, 95 N. W. 78; *Campau v. Detroit*, 106 Mich. 414, 64 N. W. 336; *Johnson v. Albany*, 86 N. Y. App. Div. 567; *Terre Haute v. Lake*, 43 Ind. 480; *U. S. Elec., etc., Co. v. Big Rapids*, 78 Mich. 67, 43 N. W. 1030; *Greenville v. Greenville W. Wks.*, 125 Ala. 625, 27 So. 764; *Maryland Steel Co. v. U. S.*, 235 U. S. 451, 59 L. Ed. 312; *Plumley v. U. S.*, 226 U. S. 545; *Smith v. Salt Lake City*, 83 Fed. 784.

⁵ *Allen Co. v. Silvers*, 22 Ind. 491; *Ely v. Grand Rapids*, 84 Mich. 336, 47 N.

out compensation¹ or so as to deprive the contract of mutuality, but the reserved right to make changes in details, with increase in compensation to meet the changes does not deprive the contract of the element of mutuality.² Nor will the right be extended beyond the particular purposes set out in the contract.³ So the right to stop the work will not arise from a reserved power to make certain changes.⁴

§ 164. Power to Modify.

No absolute power exists in public bodies to modify or change public contracts at the mere will of the body. Such contracts can be modified or changed only upon the same conditions as are imposed upon natural persons.⁵

But public bodies, from the fact that they possess the power to contract, have also the power to modify or change contracts the same as natural persons in the absence of statutory restriction.⁶

W. 447; *Doland v. Clark*, 143 Cal. 176, 76 Pac. 958; *Detroit v. Mich. Pav. Co.*, 36 Mich. 335; *Reno W., etc., Co. v. Osburn*, 25 Nev. 53, 56 Pac. 945; *Laver v. Ellert*, 110 Cal. 221, 42 Pac. 806; *McCartan v. Trenton*, 57 N. J. Eq. 571, 41 Atl. 830; *Lutes v. Briggs*, 64 N. Y. 404; *Filbert v. Philadelphia*, 181 Pa. St. 530, 37 Atl. 545.

¹ *McMaster v. State*, *supra*.

² *U. S. v. McMullen*, 222 U. S. 460, 472, 56 L. Ed. 269.

³ *Nat. Con. Co. v. Hudson R. P. Co.*, *supra*.

⁴ *Clark v. New York*, 4 N. Y. 338, 53 Am. Dec. 379.

⁵ *Von Schmidt v. Widber*, 105 Cal. 151, 38 Pac. 682; *Quincy v. Bull*, 106 Ill. 337; *Vincennes v. Citizens G. L. Co.*, 132 Ind. 114, 31 N. E. 573, 16 L. R. A. 485; *Indianapolis v. Indianapolis G. L. Co.*, 66 Ind. 396; *State v. Heath*, 20 La. Ann. 172; *Davenport Gas L. Co. v. Davenport*, 13 Iowa, 229; *Hudson E. L. Co. v. Hudson*, 163 Mass. 346, 40 N. E. 109; *Dausch v. Crane*, 109 Mo. 323, 19 S. W. 61; *Nebraska City v. Nebraska C. H. G. L. Co.*, 9 Neb. 339, 3 N. W. 870; *Taylor v. Lambertville*, 43 N. J. Eq. 107, 10 Atl. 809; *Crebs v. Lebanon*, 98 Fed. 549; *Galveston v. Morton*, 58 Tex. 409; *Western Sav. Fund Soc. v. Philadelphia*, 31 Pa. St. 175.

⁶ *Maryland Steel Co. v. U. S.*, 235 U. S. 451, 59 L. Ed. 312; *Meech v. Buffalo*, 29 N. Y. 198; *Moore v. Albany*, 98 N. Y. 396; *Voght v. Buffalo*, 133 N. Y. 463, 31 N. E. 340; *Weston v. Syracuse*, 158 N. Y. 274, 53 N. E. 12; *Fitzgerald v. Walker*, 55 Ark. 148, 17 S. W. 702; *Doland v. Clark*, 143 Cal. 176, 76 Pac.

If a public contract, because of changed circumstances or through some mistake becomes oppressive, it is within the power of the public body to modify it and allow additional compensation, or it may annul it.¹

A modification of a contract or a waiver of conditions in a contract found to be prejudicial to its interests can be made by a municipal corporation or other public body by implication.² But they may not waive or change the requirement that the cost shall be within the appropriation, for this is a statutory, not a contract condition.³

§ 165. Consideration for Modification.

A wide divergence of opinion exists upon the question as to whether a new consideration is needed to support the modification or change of an existing contract. Some take the view that a modification creates a new agreement and therefore the new agreement needs a consideration to support it.⁴ Others support the modified agreement upon the original consideration.⁵ Still others assert that parties may by mutual agreement change or modify a contract without a new consideration, that a new con-

958; *Shea v. Milford*, 145 Mass. 528, 14 N. E. 769; *Filbert v. Philadelphia*, 181 Pa. St. 530, 37 Atl. 545.

¹ *Meech v. Buffalo*, 29 N. Y. 198; *Bean v. Jay*, 23 Me. 117, 121. But where there is constitutional restraint upon legislative awards to contractors and others and the Legislature is prohibited from recognizing claims founded on gratitude and charity it may not award extra compensation to a contractor. N. Y. Laws 1919, Chap. 459, declared invalid, *Gordon v. State*, 233 N. Y. 1 See Chap. 586, Laws of New York, 1918.

² *Messenger v. Buffalo*, 21 N. Y. 199; *Randolph County v. Post*, 93 U. S. 502, 23 L. Ed. 957; *Newport News v. Potter*, 122 Fed. 332.

³ *Lord v. New York*, 171 N. Y. App. Div. 140; *Bernstein v. New York* No. 2, 143 *Id.* 543, 545; *People v. Clarke*, 79 N. Y. App. Div. 78.

⁴ *Wright v. Tacoma*, 87 Wash. 334, 151 Pac. 837.

⁵ *Ft. Madison v. Moore*, 109 Iowa, 476, 80 N. W. 527; *Dyer v. Middle Kittitas I. Dist.*, 25 Wash. 80, 64 Pac. 1009; *Long v. Pierce County*, 22 Wash. 330, 61 Pac. 142; *U. S. v. Cooke*, 207 Fed. 682.

sideration is not needed.¹ But it is claimed that where the original contract does not contemplate a supplemental agreement, the original consideration will not support such an agreement, and the supplemental or modified agreement is void for want of any other consideration to support it,² though it is said consideration may be found in the mutual assent of the parties.³ Again, it is said new consideration may be found in the acceptance and substitution of the new contract for the old.⁴ Again, the consideration is rested on waiver. Where for instance a contractor threatens to breach his contract unless he be given additional compensation, and additional compensation is promised him, the consideration to support the new promise is based upon the proposition that since the contractor had the right to abandon his contract and leave the public body to sue for damages, the new promise induces the contractor to waive the right and so the giving up of the right is the consideration which moves to the public body. While a considerable body of respectable authority supports this view it is met by the argument that it cannot logically be said that one has a right to break a contract, for no one has a right to commit a wrong. But there is plenty of authority to sustain this right. A contractor can abandon his contract. It is true he must pay the damages. But he has the right to say he will pay such rather than go on with the contract. Having this right and about to exercise it, if it be more profitable for the public, rather than sue and be com-

¹ *Shriner v. Craft*, 166 Ala. 146, 51 So. 884, 28 L. R. A. N. S. 450; *Dickey v. Vaughn*, 198 Ala. 283, 73 So. 507; *Straw v. Temple*, 48 Utah, 258, 159 Pac. 44.

² *State v. Sapulpa*, 58 Okla. 550, 160 Pac. 489.

³ *Idem*.

⁴ *Harrod v. State*, 24 Ind. App. 159, 55 N. E. 242; *Rowe v. Peabody*, 207 Mass. 226, 93 N. E. 604.

pelled to relet the contract, to choose to pay more to induce the contractor to go on, the promise is binding. It is not favoring the man who goes back on his bargain and who attempts to hold up the public body for more money to do the same work for which he already is under obligation, since the public body are not bound to submit, but are free to let the contractor go and sue him on his contract. But with modern methods of bonds to complete, the public simply call on the bondsmen to finish.¹

§ 166. Parol Modification of Written Contract.

A written contract may be modified by a subsequent parol agreement unless a writing is required by statute.²

While contracts sometimes provide that they can only be modified in a particular way or method, oral modifications are nevertheless sustained.³ A contract required by law to be in writing may be modified by an oral agreement, and where a vessel was delivered, approved and paid for, without protest on account of delay and the quartermaster general had waived orally the time limit in the contract, such oral agreement was within the scope of his official authority and amounted to a modification of the contract.⁴ This is upon the theory that the statutory requirement being for the benefit of the government may be waived by it. But there is authority that where the contract is required by law to be in writing an oral modification is invalid.⁵ Ordinarily a modification may be

¹ See *Bd. of County Comm. v. Cincinnati S. H. Co.*, 128 Ind. 240, 27 N. E. 612; *Finucane Co. v. Rochester Bd. of Educ.*, 190 N. Y. 76, 82 N. E. 737; *Bradley v. McDonald*, 218 N. Y. 351, 113 N. E. 340.

² *New York v. Butler*, 1 Barb. 325; *Contra, Chambers v. Cameron Bd. of Ed.*, 60 Mo. 370, 379.

³ *Ritchie v. State*, 39 Wash. 95, 81 Pac. 79.

⁴ *Maryland Steel Co. v. U. S.*, 235 U. S. 451, 59 L. Ed. 312.

⁵ *McManus v. Philadelphia*, 201 Pa. St. 619, 51 Atl. 322.

implied from acts of the parties.¹ If a statute requires the contract to be in writing, all alterations must be in writing, and where the contract itself requires changes to be in writing, oral modifications are invalid.² The question whether there has been a modification is usually a question of fact to be decided by a jury from the particular facts and circumstances of each case.³

§ 167. Effect of Modification.

Where the agreement is modified, the new agreement takes the place of the old one.⁴ Where work is being performed, for instance, under one contract and the parties thereto enter into a second contract modifying the first and extending the contract period, the work thereafter is performed under the first contract as modified by the second, and the contractor is not chargeable with the cost of inspection nor for liquidated damages during the extended period in accordance with a provision of the first contract before modification.⁵ But the new contract must be valid, and where the attempt to modify results in an illegal agreement the prior contract still subsists and is not affected by the effort to change.⁶ Where a contract is changed in many particulars, with the acquiescence

¹ *Messenger v. Buffalo*, 21 N. Y. 196; *Newport News Co. v. Potter*, 122 Fed. 321; *Taylor v. Lambertville*, 43 N. J. Eq. 107, 10 Atl. 809; *Duncombe v. Ft. Dodge*, 38 Iowa, 281.

² *Terre Haute v. Lake*, 43 Ind. 480; *State v. Cowgill, etc., M. Co.*, 156 Mo. 620; *Malone v. Philadelphia*, 147 Pa. St. 416, 23 Atl. 628; *Hawkins v. U. S.*, 96 U. S. 689, 24 L. Ed. 607, aff'g 12 Ct. Cl. 181; *Ferris v. U. S.*, 28 Ct. Cl. 332; *McLaughlin v. U. S.* 36 Ct. Cl. 138; *Dougherty v. Norwood Boro.*, 196 Pa. St. 92, 46 Atl. 384; *Johnson v. Albany*, 86 N. Y. App. Div. 567; *North Pacific L. & M. Co. v. East Portland*, 14 Oreg. 3, 12 Pac. 4.

³ *Cook County v. Harms*, 108 Ill. 151.

⁴ *Hayden v. Astoria*, 74 Oreg. 525, 145 Pac. 1072; *Brabazon v. Seymour*, 42 Conn. 551.

⁵ *Germann v. United States*, 50 Ct. Cl. 175.

⁶ *Scott v. Atchison*, 38 Tex. 384.

of the parties, the original contract is abrogated.¹ Where the work is deviated from in material matters so that the work is not reasonably to be recognized as the original contract, the latter is considered as abandoned.²

Whether a contract is modified or abrogated, when it was discovered that the work planned would be useless, is a question for the jury.³ But slight changes made with the acquiescence of the parties will not abrogate the obligations of the parties, but the original contract will continue to be in effect as modified.⁴

Where the public body was responsible for damages resulting from the leakage of a coffer dam, its responsibility endures although the leakage continued during an extension of the contract time obtained at the request of the contractor.⁵

Where certain of the specifications in a school contract as to material to be used for the finish of the floors were waived at the request of the contractor, and because of the change the cost to the contractor was reduced, the public body were not entitled to a reduction of the contract price nor to a counterclaim to the amount of such expenses.⁶

¹ *Hayden v. Astoria*, 74 Oreg. 525, 145 Pac. 1072.

² *Corson v. Dawson*, 129 Minn. 453, 152 N. W. 842.

³ *Mather v. Butler County*, 28 Iowa, 253.

⁴ *Cook Co. v. Harms*, 101 Ill. App. 24; *Gibbs v. Girardville Sch. Dist.*, 195 Pa. St. 396, 46 Atl. 91; *Collins v. U. S.*, 34 Ct. Cl. 294.

⁵ *Collins v. U. S.*, 34 Ct. Cl. 294.

⁶ *Finucane Co. v. Rochester Bd. of Educ.*, 190 N. Y. 76, 82 N. E. 737. See *Kingsley v. Brooklyn*, 78 N. Y. 200.

PART III. CONSTRUCTION AND OPERATION OF CONTRACT

CHAPTER XXV

GENERAL RULES

§ 168. Construction and Operation—General Observations.

While some of the courts have taken the pains to announce that public contracts are to be construed liberally in favor of the public, there is no justice in such an attitude, nor is there any occasion for thus attempting to make the various villages, towns, cities and counties, the State and the Nation, the wards of the court. As a matter of fact probably no contracting parties protect themselves more thoroughly and completely than these various public corporations. The contracts which they present to the contractor are ironclad, unvarying documents fortified and strengthened over a period of years to meet the last and every prior adverse decision from the courts. They are so fashioned in language and form, many of them, that none of the ordinary presumptions of contract law may be indulged in the case of public contracts.¹ Where individuals or private corporations contract, the form and substance of the contract is a matter of deliberation and discussion on both sides, and when completed is a mutual document. In the case of public contracts there is no opportunity for give and take, for usual bargaining, the contractor must take what is presented to

¹ State v. Sapulpa, 58 Okla. 550, 160 Pac. 489.

him. For these well-known reasons which are matter of common observation and knowledge, there is no occasion for the courts to take such a paternal attitude in behalf of those who so capably take care of themselves and whose officials do, and must, under the scrutiny of modern watchful public opinion, take close care of the public interests in all contracts which are made. One other observation might pertinently be made and that is that public bodies in general in all of their larger public operations are dealing with the strongest personalities in the contracting world. Men of real genius are at the head of wonderful organizations of skillful men which are kept together over a long period of years. They become efficient to the point of closest contact with perfection. They are financially strong and fully capable of meeting their obligations, and take a real pride in doing their work honestly and well and look with as much honest pride upon the tunnels, subways, bridges, buildings and various structures and works they have builded, as their masterpieces, the same as a sculptor or painter would look upon the product of his art or a judge would view his most masterly and rounded opinion.

Public work costs less than private work, the bidders taking less profit, because of the assured solvency of the public body. In countless instances the work has been done for less than cost. Public officials and public contractors are honorable and upright in their conduct in the making of contracts and the carrying out of the work. Cases where fraud and corruption arise are very exceptional.

§ 169. Rules Should be Universal.

Rules of interpretation of public contracts should be

universal in their application. They are founded in reason and sound common sense, and have as their touchstone the ascertainment of the intention of the parties. The moment courts, in their effort to be subtle or to work out what they think is just in a given case, depart from this standard they make a new contract for the parties, wrong their language and destroy the universality of the law by making it individual. So many cases arise in which individual treatment is accorded that after a while the rule involved in a given case is lost in a maze of unreal exceptions, which are invented to fit hard cases, or cases that may not even be properly so called, but in which the judge does violence to the contract and its language to work out what he thinks is just. There are and should be real exceptions; there is a tendency to abolish technicalities and it should be extended; there is a modern attitude of injecting equitable principles into the construction and interpretation of contracts and it should be encouraged, but there is also a language which is the only vehicle of expression capable of use in forming contracts and there is an intent which is the soul of language which animates and illumines it, and the ascertainment of this should be the single aim of the courts. To reach it, it is not necessary to do violence to language, common sense or common understanding, and when found it should be proclaimed and enforced. Such action will tend toward surer results, greater respect for the obligation of contracts, firmer assurance that contracts as written and intended will be enforced. Neither party will then be deprived of the just fruits or reward of honest effort spent or money expended in reliance upon a common understanding of his contract. And the law of contracts will thereby become more scientific and stable.

§ 170. General Rules Affecting Public Contracts.

It is fundamental that the primary object of construction in contract law is to discover the intention of the parties and to give it effect.¹ To do this, the entire agreement is to be considered as a whole, not what each part may mean, but what the agreement means considered as a whole.² And if possible the agreement should be construed so as to give effect to each provision of the contract. The intention must not be deduced from specific provisions or fragmentary parts. The true function of interpretation is to give force, effect and meaning to the words and clauses used in an instrument so as best to effectuate and carry into operation the reasonable intention of the parties.³ In determining the meaning to be accorded to doubtful language, a construction should be given, if this can fairly be done, that will support rather than defeat the instrument.⁴ The construction should not be strained in favor of, but most strongly against, the person undertaking or entering into the obligation.⁵ Public contracts must be construed in the light of the facts surrounding the parties at the time of entering into or making the agreement. Courts should consider the occasion which gave rise to the contract, the relation of

¹ *Akin v. U. S.*, 17 Ct. Cl. 260; *U. S. v. Bethlehem Steel Co.*, 205 U. S. 105, 51 L. Ed. 731; *Gt. Nor. Ry. Co. v. U. S.*, 236 Fed. 433; *U. S. F. & G. Co. v. Bd. of Comm'rs of Woodson County*, 145 Fed. 144; *Turner v. Fremont*, 159 Fed. 221, 170 Fed. 259; *Loeb v. Montgomery*, 184 Ala. 217, 61 So. 642; *St. Louis v. St. Louis & San Francisco R. Co.*, 228 Mo. 712, 129 S. W. 691; *Sterling v. Hurd*, 44 Colo. 436, 98 Pac. 174; *Parker-Washington Co. v. Chicago*, 267 Ill. 136, 107 N. E. 872.

² *U. S. F. & G. Co. v. Bd. of Comm'rs of Woodson County*, 145 Fed. 144; *Loeb v. Montgomery*, *supra*; *St. Louis v. St. Louis & S. F. R. Co.*, *supra*.

³ *Turner v. Fremont*, 159 Fed. 221; *Loeb v. Montgomery*, *supra*; *U. S. F. & G. Co. v. Bd. of Comm'rs*, *supra*; *Merrill-Ruckgaber Co. v. U. S.*, 49 Ct. Cl. 553, *aff'd* 241 U. S. 387, 60 L. Ed. 1058.

⁴ *Loeb v. Montgomery*, *supra*.

⁵ *Loeb v. Montgomery*, *supra*.

the parties and the object to be accomplished.¹ Words should not be given a strained construction, but a reasonable one. A reasonable meaning of the words employed should by implication be read into the contract in order to attain a just result, one inherent in the very nature of the transaction.² If there is a latent ambiguity in the contract then what the parties do under it is of value in interpreting it. A practical construction put upon an agreement by the parties is an interpretation of their obscurely expressed ideas by their acts, allowing what they do to exemplify and disclose the intent underlying what they say.³ Known, established and general usage and custom may be read into a contract to get at the meaning of its language when a doubt in regard to that meaning fairly arises on the whole instrument.⁴ Acquiescence in regulations of departments for a long time will not be disregarded, without most cogent and persuasive reasons.⁵ All of these aids to interpretation, however, fill no office and have no place at all when a contract is plain, unequivocal and free from ambiguity. Interpretation cannot control expression when it is clear and there is nothing to be construed. In such case, construction and interpretations by implication, or reading provisions in or out are not allowed. Implication cannot control express language. *Expressum facit cessare tacitum*.⁶ These aids to interpretation and understanding should never be

¹ *Loeb v. Montgomery, supra*; *Chicago Flour Co. v. Chicago*, 243 Ill. 268, 90 N. E. 674; *Jackson Co. L. H. & P. Co. v. Independence*, 188 Mo. App. 157, 175 S. W. 86.

² *St. Louis v. St. Louis & S. F. R. Co., supra*.

³ *Idem*.

⁴ *Idem*.

⁵ *Gt. Nor. Ry. Co. v. U. S.*, 236 Fed. 433; *U. S. v. Atlantic Coast Line R. Co.*, 206 Fed. 199.

⁶ *St. Louis v. St. Louis & S. F. R. Co., supra*; *Salt Lake City v. Smith*, 104 Fed. 457.

pressed so far as to make in effect a new contract for the parties by adding vital and burdensome terms by implication.¹ It seems to be the settled policy of our law that contracts between private persons and municipalities shall be in writing. Such policy will have little effect to produce wholesome results if the obligations assumed by the parties are to be enlarged by implication.² The law permits parties competent to contract and free to do so, in the exercise of their judgment, to make their own contracts, and the proper function of courts is to enforce such contracts as made, where they do not conflict with any rule of law or good morals, or the declared public policy of the State or Nation.³ When the intention of the parties is ascertained, it is ordinarily the duty of courts to give it effect. They have no function or right to assume a guardianship over those who have the requisite capacity to contract and are free to make such contracts as they choose.⁴ The actual intent of the parties when ascertained must prevail over dry words, inapt expressions and careless recitations in the contract, unless that intention is plainly contrary to the plain sense of the binding words of the instrument.⁵ A construction which sustains and vitalizes an agreement should be preferred to that which strikes down and paralyzes it. It should be construed so as to prevent its failure, and to give effect to the obligation of each party appearing upon it at the moment the contract itself takes effect—*ut res magis valeat quam pereat*.⁶

¹ *St. Louis v. St. Louis & S. F. R. Co.*, *supra*.

² *Idem*.

³ *Parker Washington Co. v. Chicago*, 267 Ill. 136, 107 N. E. 872; *Pacific Hdw. Co. v. U. S.*, 49 Ct. Cl. 327.

⁴ *Parker Washington Co. v. Chicago*, 267 Ill. 136, 107 N. E. 872.

⁵ *U. S. F. & G. Co. v. Bd. of Comm'rs*, *supra*; *Salt Lake City v. Smith*, 104 Fed. 457.

⁶ *U. S. F. & G. Co. v. Bd. of Comm'rs*, *supra*.

Words are to be construed in the sense in which the parties to the agreement used them when they agreed to them.¹ Lapse of time cannot change the substance of agreement.² The contract is always to be interpreted according to its true intent, although altered conditions may vary the form of fulfillment.³ Words should be construed as known to be understood by the party for whose benefit they are used.⁴ When there is doubt as to the meaning of a contract, a party will be held to that meaning which he knew the other party supposed the words to bear.⁵ A construction given to a contract by the express declaration of one party and the silent acquiescence of the other, prior to and during its performance, cannot be repudiated after a party has acted upon the faith of it.⁶ If there is a repugnancy between general clauses and more detailed, specific clauses, the latter will govern. This rule, like other rules of construction, is a mere aid to ascertain the intention of the parties, which is to be gathered from the whole instrument.⁷ A reasonable construction put upon a doubtful contract by the parties, consonant with its language and followed for a long time, will be adopted.⁸ No part of a contract will be rejected unless it is necessary so to do in order to prevent a defeat

¹ *Salt Lake City v. Smith*, 104 Fed. 457.

² *Los Angeles City Water Co. v. Los Angeles*, 88 Fed. 720; *Davin v. Syracuse*, 69 Misc. 285, 145 N. Y. App. Div. 904.

³ *Virginia v. West Virginia*, 238 U. S. 202, 236, 59 L. Ed. 1272.

⁴ *People ex rel. McDonough v. Bd. of Managers*, 96 N. Y. 640; *Clinton County v. Ramsey*, 20 Ill. App. 577.

⁵ *Scully v. U. S.*, 197 Fed. 327; *Bowers Hydr. Dredg. Co. v. U. S.*, 211 U. S. 176, 188, 53 L. Ed. 136, aff'g 41 Ct. Cl. 214.

⁶ *Scully v. U. S.*, 197 Fed. 327.

⁷ *English v. Shelby*, 116 Ark. 212, 172 S. W. 817.

⁸ *Covington v. So. Covington & C. S. R. Co.*, 147 Ky. 326, 144 S. W. 17; *McLean County Coal Co. v. Bloomington*, 234 Ill. 90, 84 N. E. 624.

of the purposes sought by the parties to the contract.¹ The entire instrument, whether on one piece of paper or on several, and all writings on the same subject when referred to and made a part of the contract, should be considered in interpreting each part.² Words should be given their ordinary and generally accepted meaning and understanding.³ When a written contract is silent in regard to a matter, it is not to be lightly presumed that it was intended to imply an agreement upon that point, unless such implication clearly appears from the whole instrument. Courts must be careful not to make it speak where it was intentionally silent, or to extend it beyond what was intended by the parties.⁴

§ 171. Ambiguity.

When there is ambiguity in a contract, it becomes open to interpretation by aid of extrinsic evidence, so as to give effect to the mutual intention of the parties. Whether an instrument is ambiguous or plain is a matter of impression rather than definition, because every provision of the contract may be as clear as language can make it, yet the complete result may be doubtful from lack of harmony in its various parts.⁵ But language cannot be deemed ambiguous where its intent harmonizes with other provisions of the contract and disagrees with none.⁶ But if there is no ambiguity, no provisions equivocal in character, and the

¹ *Alton v. Ill. Trans. Co.*, 12 Ill. 38, 52 Am. Dec. 479; *McLean County Coal Co. v. Bloomington*, 234 Ill. 90, 84 N. E. 624.

² *Sexton v. Chicago*, 107 Ill. 323; *McLean County Coal Co. v. Bloomington*, 234 Ill. 90, 84 N. E. 264.

³ *Tecumseh v. Burns*, 30 Okla. 503, 120 Pac. 270; *State v. Seattle Elec. Co.*, 71 Wash. 213, 128 Pac. 220.

⁴ *East Ohio Gas Co. v. Akron*, 81 Ohio. St. 33, 90 N. E. 40; *Churchyard v. The Queen*, L. R. 1 Q. B. 173, 195; *Pitt Cons. Co. v. Dayton*, 237 Fed. 305.

⁵ *Butte Water Co. v. Butte*, 48 Mont. 386, 138 Pac. 195.

⁶ *Day v. U. S.*, 48 Ct. Cl. 128.

result intended is plain, there is no room for construction and the contract as written must be carried out.¹ It is only where it is indefinite or uncertain in its meaning, or there are latent ambiguities that parol proof is admissible and proper, not to contradict or impeach the writing or documentary and record evidence, but to explain the apparent inconsistencies and repugnant provisions, and thus give effect to the writing as a whole. When the ambiguity is patent, it cannot be cured by oral or extrinsic evidence.²

Forfeitures not being favored in the law, the provisions upon which they are based must be strictly construed.³ They always receive a strict construction against those for whose benefit they are introduced.⁴ Equity will relieve against them when this can be done without doing violence to the contracts of the parties, and certainly will not enforce them if they are couched in ambiguous language.

§ 172. What Law Governs Interpretation.

Public contracts are no different from private contracts. The obligation of each endures under the law, and the former are governed by the same canons of interpretation as apply to contracts between natural persons.⁵

The law in force at the date of execution of the contract

¹ *St. Louis v. St. Louis & S. F. R. Co.*, 228 Mo. 712, 129 S. W. 691; *Roanoke v. Blair*, 107 Va. 639, 60 S. E. 75.

² *Mobile County v. Lynch*, 198 Ala. 57, 73 So. 423; *Douglass v. Morrisville*, 89 Vt. 393, 95 Atl. 810.

³ *Mt. Morris v. King*, 77 Hun, 18.

⁴ *Long v. Pierce County*, 22 Wash. 330, 61 Pac. 142.

⁵ *Long Beach Sch. Dist. v. Dodge*, 135 Cal. 401, 67 Pac. 499; *Sexton v. Chicago*, 107 Ill. 323; *Leavenworth v. Rankin*, 2 Kan. 357; *Vincennes v. Cits. G. L. Co.*, 132 Ind. 114, 31 N. E. 573, 16 L. R. A. 485; *Davies v. East Saginaw*, 66 Mich. 37, 32 N. W. 919; *Reed v. Anoka*, 85 Minn. 294, 88 N. W. 981; *Horgan v. New York*, 160 N. Y. 516, 55 N. E. 204; *People ex rel. Graves v. Sohmer*, 207 N. Y. 450, 101 N. E. 164; *Phelan v. New York*, 119 N. Y. 86, 23 N. E. 175; *Skelsey v. U. S.*, 23 Ct. Cl. 61; *Harvey v. U. S.*, 8 Ct. Cl. 501.

controls its interpretation.¹ Matters bearing upon the execution, the interpretation and the validity of a contract are determined by the law of the place where the contract is made. Matters relating to its performance are controlled by the law which prevails at the place of performance. Matters respecting the remedy, the bringing of suits, character of evidence and limitation of actions depend upon the law of the forum.² It has been said, however, that contracts are to be construed liberally in favor of the public when their subject-matter concerns the public interest.³

§ 173. Courts Possess no Power to Make New Contract for Parties.

The courts have no power to change or modify the terms of the contract which the parties have made and which by law establishes their rights, duties and liabilities. They have no right or authority to make a new contract by construction,⁴ nor under the guise of construction impose conditions or obligations not expressed in or clearly implied from the contract. But where a contract provides for the extension of its operation to new parties upon reasonable terms and regulations, the parties will not be permitted to destroy its effectuation or enforcement by failing to act. Under these circumstances a court of equity will state what these terms and regulations are. This is not making a new contract for the parties, but the carry-

¹ *Piedmont Pav. Co. v. Allman*, 136 Cal. 88, 68 Pac. 493; *Philadelphia v. Jewell*, 135 Pa. St. 329, 20 Atl. 281; *U. S. v. Dietrich*, 126 Fed. 671.

² *Burton v. U. S.*, 202 U. S. 344, 50 L. Ed. 1057; *Scotland County v. Hill*, 132 U. S. 107, 117, 33 L. Ed. 261, aff'g 25 Fed. 395; *Ill. Surety Co. v. John Davis Co.*, 244 U. S. 376, 381, 61 L. Ed. 1206, aff'g 226 Fed. 653.

³ *Joy v. St. Louis*, 138 U. S. 1, 38, 47, 34 L. Ed. 843, aff'g 29 Fed. 546.

⁴ *Conway & Co. v. Chicago*, 274 Ill. 369, 113 N. E. 703; *Gamewell & Co. v. LaPorte*, 102 Fed. 417.

ing out of the intention of the parties and the enforcement of the very contract intended.¹

§ 174. Construction Should Effect Reasonable Result and Lawful Purpose.

A construction which is lawful, which preserves good faith, and frees the contract from the imputation of impairing rights will be accepted, if possible, in preference to a contrary construction. For where a contract is fairly open to two constructions, by one of which it would be lawful and the other unlawful, the former must be adopted.² If of two constructions possible, one will render the contract valid and the other void, the former will be adopted if it can be done without violence to the ascertained intention of the parties.³ It is presumed that the parties to a contract intended a lawful purpose, that they knew the law and intended to obey it.⁴ The language of contracts should not be given a strained construction, but should be interpreted to accomplish a reasonable rather than an unreasonable result.⁵ When there is doubt or uncertainty as to the meaning of words in an instrument,

¹ *Joy v. St. Louis*, 138 U. S. 1, 34 L. Ed. 843, aff'g 29 Fed. 546; *Providence v. St. John's Lodge*, 2 R. I. 46. See *Jones v. Lanier*, 198 Ala. 363, 73 So. 535.

² *Hobbs v. McLean*, 117 U. S. 567, 29 L. Ed. 940; *U. S. v. Cent. Pac. R. Co.*, 118 U. S. 235, 30 L. Ed. 173, aff'g 21 Ct. Cl. 180; *Finley v. Sch. Dist.*, 51 Mont. 411, 153 Pac. 1010; *Foard County v. Sandifer*, 105 Tex. 420, 151 S. W. 523; *Lamar W. Co. v. Lamar*, 128 Mo. 188, 26 S. W. 1025, 31 S. W. 756.

³ *Finley v. Sch. Dist.*, *supra*.

⁴ *Foard County v. Sandifer*, *supra*; *Tomlinson v. Hopkins County*, 57 Tex. 572.

⁵ *Ryan v. Dubuque*, 112 Iowa, 284, 83 N. W. 1073; *McCain v. Des Moines*, 128 Iowa, 331, 103 N. W. 979; *Conway Co. v. Chicago*, 274 Ill. 369, 113 N. E. 703; *Jersey City v. Flynn*, 74 N. J. Eq. 104, 70 Atl. 497, mod. 76 N. J. Eq. 607, 76 Atl. 3; *St. Louis v. St. Louis & S. F. R. Co.*, 228 Mo. 712, 129 S. W. 691; *Royalton v. Royalton & W. T. Co.*, 14 Vt. 311; *U. S. v. Cent. Pac. R. Co.*, 118 U. S. 235, 30 L. Ed. 173, aff'g 21 Ct. Cl. 180; *Bayne v. U. S.*, 195 Fed. 236, 241.

if possible, they should not be so construed as to place one of the parties entirely at the mercy of the other.¹

§ 175. Meaning and Kind of Notice.

When a contract requires a notice to be given for the purpose of creating a liability or imposing an obligation, personal notice is intended and should be given, unless the parties expressly stipulate that the notice shall be served or given in some other way such as mailing. Of course where the party to whom the notice must be given conceals himself or resorts to trick or artifice to avoid the service of a personal notice, reasonable efforts to serve the notice personally will operate to satisfy the duty imposed.² So where a statute requires notice to be given to a party as a basis of a forfeiture of some right or interest, it means a notice in writing in the absence of some provision in the statute which prescribes a different method of giving the notice.³

¹ *Dunning v. County of Orange*, 139 N. Y. App. Div. 249, 204 N. Y. 647, 97 N. E. 1104.

² *Haldane v. U. S.*, 69 Fed. 819.

³ *Erving v. Mayor*, 131 N. Y. 133, 29 N. E. 1101. See *Becker v. Churdan*, 175 Iowa, 159, 157 N. W. 221.

CHAPTER XXVI

SPECIAL CIRCUMSTANCES

§ 176. Usages of Trade or Business.

The signification or import of words or expressions in any trade or business may be so fixed by usage that, in order to arrive at the true intent of the parties in entering a contract, resort must be had to proof of the technical meaning of such words or expressions. But the usages of trade fall into the same class as all other rules of construction. They are mere aids to explain, not express and clear stipulations, but those of doubtful and equivocal character, and to ascertain the meaning of words of doubtful signification or which may be understood in different senses. Such extrinsic evidence is admissible because, like all rules of interpretation, it is presumed the parties knew of their existence and contracted with reference to them. But if the usages are inconsistent with the contract or expressly or by necessary implication contradict or vary it, they will not be received in evidence. A usage or trade meaning will not be given effect when this defeats the plain language of the agreement.¹ If a contract gives to words used a plain and unambiguous signification, the abstract or commercial meaning of those words is irrelevant and is not admissible. The commercial meaning of words cannot be imported, through expert testimony, into a contract for the purpose of destroying its plain and obvious intendment.²

¹ *Dillow & Co. v. Monticello*, 145 Iowa, 424, 124 N. W. 186.

² *Bowers Hydr. Dredging Co. v. U. S.*, 211 U. S. 176, 53 L. Ed. 136, aff'g 41 Ct. Cl. 214.

It is a universal rule that usages and customs are never allowed to operate against express contracts.¹ To permit evidence of a usage or custom, it must be so general as to raise the presumption that the parties had knowledge of it and contracted with reference to it. The party claiming such a usage must prove it.² But in giving proof of a custom a party is not permitted to prove his construction of the contract.³ To prove such usage or custom it is not necessary to specially plead it.⁴

§ 177. Inconsistent Provisions—Conflicting Clauses.

When repugnancy is found between clauses of a contract, the one which essentially requires something to be done to effect the general purpose of the contract itself is entitled to greater consideration than the other, which tends to defeat a full performance, and repugnant words may be rejected in favor of a construction which makes effectual the evident purpose of the entire agreement. The secondary must give way to the essential.⁵ The first of two contradictory provisions ordinarily will prevail, but not where it is provided by statute that when an instrument consists partly of written and partly of printed form, the former controls the latter, if the two are inconsistent. The statute supercedes the common law.⁶ Where there is a conflict so irreconcilable between essential provisions of the assumed contract and material parts of the specifications, and the specifications cannot in reason be ignored, or treated as abrogated, the contract is void for uncertainty

¹ *Burnham v. Milwaukee*, 100 Wis. 55, 75 N. W. 1014.

² *Fellows v. Dorsey*, 171 Mo. App. 289, 157 S. W. 995.

³ *Indep. Sch. Dist. v. Swearingen*, 119 Iowa, 702, 94 N. W. 206.

⁴ *Becker v. Churdan*, 175 Iowa, 159, 157 N. W. 221.

⁵ *Morrill & W. Cons. Co. v. Boston*, 186 Mass. 217, 71 N. E. 550.

⁶ *Urbany v. Carroll*, 176 Iowa, 217, 157 N. W. 852.

and may not be enforced.¹ Where a contract contained a provision that no extra work should be allowed or paid for and the contract required a contractor to go down to solid rock to erect abutments and the contractor refused to sign the contract, and an added stipulation was inserted to the effect that if rock was not found as shown by the plans and borings he should be paid for any extra work, this clause operated to abrogate or limit the "no extra" clause so far as it was inconsistent with it.²

§ 178. General Words and Expressions are Controlled by Specific.

General expressions are restricted, under a familiar maxim, by specific terms which succeed them, and are not permitted to control the specific provisions of the contract.³ A general clause of a contract, which provides that everything necessary to make structures or work complete and ready for use shall be furnished by the contractor whether specified or not, must be governed by specific provisions which describe exactly and in detail what is to be furnished.⁴ Where a contract provides that the contractor shall be liable for all damages to person and property arising from his negligence or of his employees and for all violations of law, city ordinances or government regulations, and generally provides that the contractor shall be liable for all accidents causing loss to the city, this latter general clause will be controlled by the specific language, which limits the liability of the contractor by the restriction contained in the specific and particular

¹ U. S. v. Ellicott, 223 U. S. 524, 56 L. Ed. 535.

² Capital City B. & P. Co. v. Des Moines, 136 Iowa, 243, 113 N. W. 835.

³ Erickson v. U. S., 107 Fed. 204; Johnson County v. Wood, 84 Mo. 489; English v. Shelby, 116 Ark. 212, 172 S. W. 817; Vulcanite Pav. Co. v. Philadelphia, 239 Pa. St. 524, 86 Atl. 1086.

⁴ Erickson v. U. S., *supra*.

statement that he shall be liable for all accidents caused by negligence.¹ So where a government contract provides in general language that no claim shall be made against it on account of any excess or deficiency in quantities, and that bidders are expected to examine the maps and drawings and to visit the locality of the work and to make their own estimates of facilities and difficulties attending the work, these provisions cannot prevail so as to deprive a contractor of damages suffered because of a positive statement in the specifications indicating the specific character of filling back of an old dam.²

§ 179. Prior Negotiations—Reference to in Construction of Meaning of Language Used.

Verbal agreements between the parties to a written contract made before, or at the time of execution, of the contract are in general inadmissible to vary its terms or to affect its construction. All such verbal agreements are to be considered as merged in the writing. Oral agreements subsequently made on a new and valuable consideration, and before the breach of the contract, stand upon a different footing. Such agreements may vary any of its terms or may waive or discharge it altogether.³

But previous and contemporaneous transactions may very properly be taken into consideration to ascertain the subject-matter of a contract and the sense in which the parties have used particular words.

This is not for the purpose of making a contract for

¹ *New York v. American Railway T. Co.*, 66 Misc. 166, 143 N. Y. App. Div. 928.

² *Hollerbach v. U. S.*, 233 U. S. 165, 58 L. Ed. 898. See *U. S. v. Spearin*, 248 U. S. 132, 63 L. Ed. 166; *U. S. v. Atlantic Dredging Co.*, 253 U. S. 1, 64 L. Ed. 735; *U. S. v. Smith*, 256 U. S. 11, aff'g 54 Ct. Cl. 119.

³ *Riley v. Brooklyn*, 46 N. Y. 444; *Hawkins v. U. S.*, 96 U. S. 689, 24 L. Ed. 607, aff'g 12 Ct. Cl. 181.

the parties, but to understand what contract was actually made. In such cases of doubt as to the meaning of language actually used, reference is sometimes had to prior negotiations.¹

§ 180. Verbal Agreements Merged.

All verbal agreements between the parties to a public contract in writing made before or at the time of execution of the instrument are considered as merged in the writing.² Subsequent oral agreements stand upon a different footing and if made upon sufficient consideration may alter, vary, waive or discharge the prior writing.³

§ 181. Insertion of Writing in Printed Form.

Words written in ink in a printed form are given more force, since they are presumed to express the deliberate intention of the parties more fully, than the adopted provisions of printed or even typewritten forms.⁴ The general rule is that where a printed form is used to be filled up by writing, the written part will control in the construction of the contract.⁵

§ 182. Grammatical Construction.

Punctuation is not allowed to conclusively determine the character of a writing. The presence or absence of a comma or other mark of punctuation is a rather unreliable standard by which to interpret a writing. So it is held

¹ *U. S. v. Bethlehem Steel Co.*, 205 U. S. 105, 51 L. Ed. 731; *Simpson v. U. S.*, 199 U. S. 397, 50 L. Ed. 245; *Brawley v. U. S.*, 96 U. S. 168, 24 L. Ed. 622, aff'g 11 Ct. Cl. 522; *English v. Shelby*, 116 Ark. 212, 172 S. W. 817.

² *Hawkins v. U. S.*, 96 U. S. 689, 24 L. Ed. 607, aff'g 12 Ct. Cl. 181; *Burnham v. Milwaukee*, 100 Wis. 55, 75 N. W. 1014.

³ *Hawkins v. U. S.*, *supra*. See *Simpson v. U. S.*, 199 U. S. 397, 50 L. Ed. 245.

⁴ *Sprague Elec. Co. v. Hennepin County*, 83 Minn. 262, 86 N. W. 332.

⁵ *Chicago v. Weir*, 165 Ill. 582, 46 N. E. 725; *People v. Dulaney*, 96 Ill. 503.

generally that punctuation may be disregarded entirely or it may when useful be resorted to as an aid in construction, which it only is at most.¹

§ 183. Construction against Party Who Draws Contract.

When there is ambiguity or obscurity in a contract, which the other party to the instrument does not explain, it will be construed against the party drawing the contract.² Ambiguous, doubtful or obscure expressions are interpreted against the party who prepared the contract and used the language.³ Language in deeds or grants is construed, where it admits of two constructions, against the grantor even though it be the public.⁴ In some jurisdictions public contracts are construed, not contra proferentum, but liberally in favor of the public.⁵ An examination of these decisions shows that such rule only applies to cases involving the grants of valuable franchises, but the rule cannot justly be extended to other public contracts, and as to these the same rule of construction applies as is invoked in the case of private contracts. In some States the matter is controlled by statute, which provides that all uncertainty in a public contract is presumed to be caused by the private party contracting with a public body or officer.⁶

¹ *De Soto County v. Dickson*, 34 Miss. 150; *Commonwealth v. Grant*, 201 Mass. 458, 87 N. E. 895; *Cochran v. Vermilion County*, 113 Ill. App. 140.

² *McClintic M. Cons. Co. v. Hudson County Bd.*, 83 N. J. Eq. 539, 91 Atl. 881.

³ *Gibbons v. U. S.*, 15 Ct. Cl. 174, 109 U. S. 200, 27 L. Ed. 906.

⁴ *Alton v. Ill. Trans. Co.*, 12 Ill. 38, 52 Am. D. 479; *Duryea v. Mayor*, 62 N. Y. 592; *Carthage T. P. Mills v. Carthage*, 200 N. Y. 1, 93 N. E. 60.

⁵ *Muncie Nat. Gas Co. v. Muncie*, 160 Ind. 97, 66 N. E. 436; *Omaha W. C. v. Omaha*, 147 Fed. 1; *Joy v. St. Louis*, 138 U. S. 1, 34 L. Ed. 843, aff'g 29 Fed. 546.

⁶ *State v. Sapulpa*, 58 Okla. 550, 160 Pac. 489.

§ 184. Construction—Sale of Goods—Warranty as to Quality or Quantity.

Where a contract is made to sell or furnish certain goods, identified by reference to independent circumstances, such as a lot on deposit in a warehouse, or all that may be manufactured in a named establishment, or that may be shipped in certain vessels and the quantity is named with the qualification of “about” or “more or less,” or words of like import, the contract applies to the specific lot, and the naming of the quantity is not regarded as in the nature of a warranty, but only as an estimate of the probable amount, in reference to which good faith is all that is required of the party making it.¹ But when no such independent circumstances are referred to and the engagement is to furnish goods of a certain quality or character to a certain amount, the quantity specified is material and governs the contract.² A contract to deliver eight hundred eighty cords of wood more or less as shall be determined to be necessary is not for the delivery of any particular lot or any particular quantity, and the quantity designated is to be regarded merely as an estimate of what may be required.³ A contract for furnishing stamped envelopes and newspaper wrappers in such quantities as may be called for by the Post Office Department during a period of four years from a stated date, is an absolute contract entitling the contractor to supply such department all needed during that period, and may not be revoked.⁴

¹ *Brawley v. U. S.*, 96 U. S. 168, 24 L. Ed. 622, aff'g 11 Ct. Cl. 522.

² *Brawley v. U. S.*, *supra*; *U. S. v. Purcell Env. Co.*, 249 U. S. 313, 63 L. Ed. 620.

³ *Brawley v. U. S.*, *supra*.

⁴ *U. S. v. Purcell Envelope Co.*, 249 U. S. 313, 63 L. Ed. 620.

§ 185. Operation—Construction—Clause of Contract to Maintain Repairs in Pavement.

Where a contract contains a clause which provides that during a certain period after acceptance by the public body the contractor will maintain and repair the pavement, the effect of which is to guarantee the durability of his work, and it provides for the serving of written notice of defects, he can only be held to make such repairs as he is called on to make by notice as indicated.¹ If the provision is that should the paving become defective from improper material or construction, repairs may be made by the public body at the expense of the contractor, the latter can only be made liable for defects which are the result of improper material or construction.² And a contractor will not be liable for repairs if the public body in making the repairs substitutes a new kind of pavement.³ In like manner if the public body allows the pavement to fall into a deep state of disrepair, so that it is in abnormal condition, it must restore it to a normal condition before it can properly require the contractor to make repairs.⁴ The clause will not be extended to include damage caused by the bursting of a water main.⁵ When a city includes a repair clause in its paving contract which imposes the duty upon the paving contractor to keep it in repair during a certain period, this will operate to relieve a railroad company having the statutory duty to pave between its tracks from the duty of repairing such pavement and from lia-

¹ *O'Keeffe v. New York*, 173 N. Y. 474, 66 N. E. 194; *Warren-Scharf A. P. Co. v. St. Paul*, 69 Minn. 453, 72 N. W. 711.

² *American Bond Co. v. Ottumwa*, 137 Fed. 572; *Dist. of Columbia v. Clephane*, 2 Mackey, 155, aff'd 110 U. S. 212, 28 L. Ed. 122; *Morley v. St. Joseph*, 112 Mo. App. 671, 87 S. W. 1013.

³ *Dist. of Columbia v. Clephane*, *supra*.

⁴ *State v. New Orleans & C. R. Co.*, 52 La. Ann. 1570, 28 So. 111.

⁵ *Green River A. Co. v. St. Louis*, 188 Mo. 576, 87 S. W. 985.

bility for defects during such period.¹ Where a public service company under its franchise contract agrees to repave between and next its rails with the same material used by the city in repaving, it is for the city where unrestrained by contract to determine what kind of pavement public convenience and necessity demand, and courts cannot control its determination as arbitrary and unreasonable.²

¹ *Binninger v. New York*, 177 N. Y. 199, 69 N. E. 390.

² *Milwaukee Elec. R. Co. v. Milwaukee*, 252 U. S. 100, 64 L. Ed. 476.

CHAPTER XXVII

WHERE SEVERAL INSTRUMENTS FORM CONTRACT

§ 186. Several Instrumental Parts of One Transaction Read Together.

It is a general rule that written instruments executed at the same time, or about the same time, between the same parties and relating to the same subject-matter, may be read together for the purposes of construction and interpretation and to arrive at the intention of the parties.¹ But where they do not relate to the same subject-matter and are not executed about the same time, the rule can have no application. The identity of parties and subject-matter is not controlling where the intention is that the contracts shall be separate contracts.² Even where the contracts are connected one with the other by reference but only for limited purposes, the union of contracts will not be extended beyond the purposes intended.³ So where the resolutions of a public board, recorded on the minutes of that body, are made a part of a contract, the contract and the record will be read together, according effect to each provision, if practicable.⁴ If the written contract makes both the drawings and specifications a part of it, and there is no inconsistency between the drawings and

¹ *McMaster v. State*, 108 N. Y. 542, 550, 15 N. E. 417; *New Britain v. New Britain Tel. Co.*, 74 Conn. 326, 329, 50 Atl. 881, 1015; *Atcheson v. Hutchison*, 51 Tex. 223.

² *McMaster v. State*, *supra*.

³ *Beattie v. McMullen*, 80 Conn. 160, 67 Atl. 488; *Guerini Stone Co. v. Carlin Cons. Co.*, 240 U. S. 264, 60 L. Ed. 636.

⁴ *Mobile County v. Lynch*, 198 Ala. 57, 73 So. 423.

the specifications, but one is incomplete because not showing certain materials to be used, one will be considered as supplemental to the other, and all will be read together.¹ Where the contract mentions a specific and definite date to commence work and to complete it, a general statement in the specifications fixing a different time from the time fixed in the contract and imposing damages for delay cannot apply and the contract will control.² But if there is inconsistency between the specifications and the contract and the former cannot be ignored, the contract is void.³ Where a subcontract to furnish stone for abutments of a bridge provided that the stone must comply with the original contract, which was made a part of the subcontract for greater particularity and to make the provisions of the subcontract clear, and only such parts of the original contract as might be applicable were incorporated, such a reference to the original contract will not bind the subcontractor to comply with the provisions requiring extras to be on the written order of the engineer.⁴ A letter written by a contractor to the public body and attached to the written contract before it is executed amounts to a modification of the formal terms of the contract to the extent at least of showing how such terms must be construed.⁵ A letter which is delivered to a public body contemporaneously with the accepted proposal will be read as part of the contract and explanatory thereof, and will limit the place where the work is to be done as therein described.⁶

¹ *Smith v. Bd. of Educ. of Parkersburg*, 76 W. Va. 239, 85 S. E. 513.

² *Miller v. Hamilton*, 216 Fed. 131. See *Dean v. Mayor*, 167 N. Y. 13, 60 N. E. 236.

³ *U. S. v. Ellicott*, 223 U. S. 524, 56 L. Ed. 535.

⁴ *Beattie v. McMullen*, *supra*.

⁵ *Sanborn v. U. S.*, 46 Ct. Cl. 254.

⁶ *N. Y. Metal Ceiling Co. v. New York*, 133 N. Y. App. Div. 110.

§ 187. Several Statutes Constituting Agreement will be Construed Together.

Where several acts of Congress taken together constitute the contract between the United States and its contractor, they are to be construed together as one act, and one part will be interpreted by another.¹ In like manner an ordinance made part of a contract will be read with it.²

§ 188. Agreement to Agree to do Something.

An agreement to do a certain thing and an agreement to agree to do it are legally identical,³ and in contemplation of law, the refusal to carry out the latter agreement carries the same consequence in damages.⁴

§ 189. Instruments Annexed or Referred to.

Where other instruments are made a part of the contract by annexation or reference they will be interpreted as part thereof.⁵ But maps, profiles, estimates and proposals constitute no part of the consummated agreement between the parties, except as they are referred to in the contract and by such reference incorporated into and made a part of it.⁶ Accordingly reference for a limited purpose will make the principal contract a part of a subcontract or other contract only for that purpose.⁷ Where there is a

¹ *U. S. v. Cent. Pac. R. Co.*, 118 U. S. 235, 30 L. Ed. 173, aff'g 21 Ct. Cl. 180.

² *State ex rel. Keith v. Comm. Council*, 138 Ind. 455, 37 N. E. 1041.

³ *North Bergen Bd. of Educ. v. Jaeger*, 67 N. J. L. 39, 50 Atl. 583.

⁴ *Lynch v. Mayor*, 2 N. Y. App. Div. 213; *Pennell v. Mayor*, 17 *Id.* 455; *Williams v. New York*, 118 *Id.* 756, 763, 764, 192 N. Y. 541, 84 N. E. 1123.

⁵ *Riley v. Brooklyn*, 46 N. Y. 444; *Dean v. New York*, 167 N. Y. 13, 60 N. E. 236; *Barry v. New York*, 38 N. Y. App. Div. 632; *Cent. Bit. Pav. Co. v. Mt. Clemens*, 143 Mich. 259, 106 N. W. 888; *Lake View v. MacRitchie*, 134 Ill. 203, 25 N. E. 663. See *Isaacs v. Dawson*, 70 N. Y. App. Div. 232, 174 N. Y. 537, 66 N. E. 1110.

⁶ *Riley v. Brooklyn*, *supra*; *Dunn v. New York*, 205 N. Y. 342, 98 N. E. 495.

⁷ *Beattie v. McMullen*, 80 Conn. 160, 67 Atl. 488; *Guerini Stone Co. v. Carlin Cons. Co.*, 240 U. S. 264, 60 L. Ed. 636; *People ex rel. Williams Eng. Co. v. Metz*, 193 N. Y. 148, 85 N. E. 1070, 194 N. Y. 145, 86 N. E. 986.

difference or discrepancy between the contract and a plan or specifications, the contract will control.¹ Where there are differences between several sets of plans furnished by a public body as a guide for estimates of work proposed to be let, the one furnished to a contractor which he made the foundation of his contract will control. Since such differences in plans are traceable to the fault of the public body, it will not be permitted to take advantage of its own wrong to the prejudice of the contractor.²

§ 190. Reference to a Prior Abandoned Contract.

Where a public body makes a contract to complete a prior abandoned contract, the new contract is independent of the old and stands the same as if no other had been made. The new contractor is entitled to nothing for what the former contractor did and is responsible for no default of his. Reference to the old contract in the new is only to measure the amount of work to be done thereunder. There is no privity of contract by which he can claim to be exempt from the application of a statute passed after the execution of the abandoned contract.³

¹ *Dean v. Mayor*, 167 N. Y. 13, 60 N. E. 236; *Palladino v. Mayor*, 56 Hun, 565, 125 N. Y. 733, 26 N. E. 757; *Harvey v. U. S.*, 8 Ct. Cl. 501; *Miller v. Hamilton*, 216 Fed. 131.

² *Sexton v. Chicago*, 107 Ill. 323; *Beckwith v. New York*, 148 N. Y. App. Div. 658, 210 N. Y. 530, 103 N. E. 1121; *Dean v. Mayor*, *supra*.

³ *People ex rel. Williams Eng. Co. v. Metz*, 193 N. Y. 148, 85 N. E. 1070, 194 N. Y. 145, 86 N. E. 986.

CHAPTER XXVIII

PARTS IMPLIED

§ 191. Existing Law Part of Contract.

The laws which subsist at the time and place of making a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms.¹ But where the parties do not intend the erection of a fence around a reservoir and no mention of it is made in the contract, the provisions of a statute relating to the erection of fences will not be injected into a contract, for this would be to add a term to the contract not agreed upon by the parties, and this the court cannot do.² Where a railroad company entered into a contract to grade a street over which the county at the time of the contract had jurisdiction, the law will presume that the parties contracted with reference to the facts and the law as they existed at such time.³

§ 192. Terms Implied in Contracts.

There are many terms of a contract which, while not actually expressed therein, will be implied by law. Although not actually uttered, terms which the law implies and which the parties intended to express but failed, will be

¹ *Rees v. Watertown*, 19 Wall. (U. S.) 107, 22 L. Ed. 72; *U. S. v. Dietrich*, 126 Fed. 671; *Armour P. Co. v. U. S.*, 153 Fed. 1, 19; *Von Hoffman v. Quincy*, 4 Wall. (U. S.) 535, 550, 18 L. Ed. 403; *Jefferson Bd. of Education v. Littrell*, 173 Ky. 78, 190 S. W. 465; *Milwaukee v. Raulf*, 164 Wis. 172, 159 N. W. 819; *Gregg School Township v. Hinshaw*, — Ind. App. —, 132 N. E. 586.

² *Mayor &c. Jersey City v. Jersey City W. S. Co.*, 76 N. J. Eq. 607, 76 Atl. 3.

³ *Ettor v. Tacoma*, 77 Wash. 267, 137 Pac. 820.

included therein by force of law.¹ The law existing at the time and place of the contract is part of it.² Provisions of law or of the Constitution specially applicable to the subject-matter of the contract are a part of it, need not be referred to therein, and the parties are presumed to have contracted with reference to these. Under such existing laws the terms of a contract for the rendering of a public service are subject to the right of government to regulate the service and the rate of charge.³ Although the general rule is as stated above, that necessary implications are as much a part of it, as though plainly expressed in it, yet in order to apply this rule the implication must arise from the language employed in the instrument, or be indispensable to effectuate the intention of the parties. When the language employed is obscure, imperfect or ambiguous, the instrument is open to construction and then the prime object is to ascertain the intention of the parties. In such case the court can go no further than to collect the intention from the language employed, as applied to the subject-matter in view of the attending circumstances. The court cannot by implication put into a written instrument what the parties have left out of it, though by mistake, nor can it reject what they have put into it, unless repugnant to some other part.⁴

When a written contract is silent in regard to a matter of great importance to the parties, it is not lightly to be presumed the parties intended to imply an agreement

¹ *New York v. Delli Paoli*, 202 N. Y. 18, 94 N. E. 1077; *Kinser Cons. Co. v. State*, 125 N. Y. Supp. 46, 54, 145 N. Y. App. Div. 41, 204 N. Y. 381, 97 N. E. 871; *Crocker v. U. S.*, 21 Ct. Cl. 255; *Taylor v. Dist. of Columbia*, 17 Ct. Cl. 367.

² See § 191, *ante*.

³ *State ex rel. Ellis v. Tampa W. Wks. Co.*, 56 Fla. 858, 47 So. 358, 57 Fla. 533, 48 So. 639.

⁴ *Caverly Gould Co. v. Vil. of Springfield*, 83 Vt. 396, 76 Atl. 39.

upon that point. The implication must appear from the whole instrument. The courts when called upon to imply an obligation or duty not appearing in the terms of a contract, must take great care that they do not make the contract speak where it was intentionally silent, or that they make it speak contrary to the intention of the parties.¹ Implications contrary to the express terms of a contract will not be indulged. A contractor will not be required to do something entirely outside of the contract, especially where it is apparent, not only from the nature of the transaction, but from the words of the stipulations of the contract, that such obligation belongs to the public body.² There is an implied undertaking on the part of each party to every contract that he will not intentionally and purposely do anything to prevent the other party from carrying out the agreement on his part.³ The law implies good faith in the making and performance of contracts.⁴ In like manner the law implies the term reasonable, and eliminates unreason from many contracts as unavoidably intended by the parties and shown from the surrounding circumstances.⁵ In connection with the implication of existing law as part of every contract it is to be remembered that the general law of the State is part of or an amendment of all municipal charters and is to be read into every public contract with the charter provisions affecting such contracts in so far as applicable.⁶

¹ *East Ohio Gas. Co. v. Akron*, 81 Ohio St. 33, 90 N. E. 40, 26 L. R. A. N. S. 92; *Churchyard v. Queen L. R.*, 1 Q. B. 173, 195.

² *Gibbons v. U. S.* 15 Ct. Cl. 174, *aff'd* 109 U. S. 200, 27 L. Ed. 906; *Preston v. Syracuse*, 158 N. Y. 356, 53 N. E. 39.

³ *Cameron Hawn Realty Co. v. Albany*, 207 N. Y. 377, 101 N. E. 162.

⁴ *Gardner v. Cameron*, 155 N. Y. App. Div. 750.

⁵ *Ferguson Cont. Co. v. State*, 70 Misc. (N. Y.) 472; *Kinser Cons. Co. v. State*, 204 N. Y. 381, 97 N. E. 871; *Jersey City v. Flynn*, 74 N. J. Eq. 104, 70 Atl. 497; *State ex rel. Ellis v. Tampa W. Wks Co.*, 56 Fla. 858, 47 So. 358.

⁶ *Matter of Plattsburgh*, 157 N. Y. 78, 51 N. E. 512.

In every contract for the performance of construction work or the erection of public buildings there is an implied term that the public body for whom the work is contracted to be done will not obstruct or delay the contractor, but on the contrary will always facilitate the performance of the work to be done by him.¹ A contractor may therefore recover loss entailed while awaiting the location of his work by the engineer.² But a public body does not insure that immediate possession and use of the site shall be given to the builder. Its undertaking is that so far as its own acts are concerned possession and use shall be given. If this is prevented by a trespasser, the public body is not liable in damages.³

¹ *Ryder Bldg. Co. v. Albany*, 187 N. Y. App. Div. 868.

² *U. S. v. Smith*, 256 U. S. 11, aff'g 54 Ct. Cl. 119.

³ *Porter v. Tottenham Urban Council*, 84 L. J. K. B. 1041.

CHAPTER XXIX

EXTRINSIC CIRCUMSTANCES

§ 193. Construction by the Parties.

Where the language used by the parties to a public contract is indefinite or ambiguous and hence of doubtful construction, the practical interpretation by the parties themselves is entitled to great, if not controlling, influence.¹ There is no surer way to find out what the parties mean than to see what they have done, to get at the intention behind what they say, as illuminated by what they do. Some courts have extended this rule and declare that where work is performed in accordance with a plan and with materials supposed and understood to be what was required by contract and to be paid for at the contract price, but such work and materials are furnished in variance from the literal meaning of the contract, the practical construction which the parties put upon its terms and according to which the work was done, cannot be ignored or disregarded, but must prevail over the literal meaning of the contract.² This is not the prevailing rule. Since this rule of construction is like all others, a

¹ *Shipman v. Dist. of Columbia*, 18 Ct. Cl. 291, 119 U. S. 148, 30 L. Ed. 337; *Chicago v. Sheldon*, 9 Wall. (U. S.) 50, 19 L. Ed. 594; *Bd. of Comm'rs of Fulton County v. Gibson*, 158 Ind. 471, 63 N. E. 982; *Stover v. Springfield*, 167 Mo. App. 328, 152 S. W. 122; *Douglass v. Morrisville*, 89 Vt. 393, 95 Atl. 810; *Ferguson Cont. Co. v. State of N. Y.*, 70 Misc. 472, 489; *Beaver Eng. & Cont. Co. v. New York*, 192 N. Y. App. Div. 662; *Nicoll v. Sands*, 131 N. Y. 19, 29 N. E. 818.

² *Dist. of Columbia v. Gallaher*, 124 U. S. 505, 31 L. Ed. 526, aff'g 19 Ct. Cl. 564; *Bowers Hydr. Dredging Co. v. U. S.* 211 U. S., 176, 53 L. Ed. 136, aff'g 41 Ct. Cl. 214; *O'Dea v. Winona*, 41 Minn. 424, 43 N. W. 97.

mere aid to ascertain the intention of the parties, its application should find no instance, except in cases of ambiguity, indefiniteness or obscurity. Practical construction should, therefore, not prevail over a clear and definite term of a contract and only becomes important or entitled to consideration in cases of doubt.¹ Nevertheless it is declared that when the parties to a contract of doubtful meaning, guided by self-interest, enforce it for a long time by a consistent and uniform course of conduct, so as to give it a practical meaning, the courts will treat it as having that meaning, even if as an original proposition they might have given it a different one. But the doctrine is never applied unless the door is opened by an ambiguity, which is the foundation of the principle upon which the doctrine is rested. The ambiguity required to exist must not be captious, but should be so serious as to raise a reasonable doubt in a fair mind before the principle of practical construction can be applied.² A practical construction cannot be adopted if inconsistent with a fair and reasonable rendering of the contract itself.³ Such a construction is, however, presumed to be right because made by the parties themselves when under the influence of conflicting interests. This is true whether the construction is by contemporaries or successors, since it is self-interest which makes construction safe. If the parties do not know what they meant, who can know? Practical construction therefore by uniform and unquestioned acts from the inception of the contract, especially where long

¹ *Barber A. P. Co. v. St. Paul*, 224 Fed. 842; *Packwaukee v. Amer. Bridge Co.*, 183 Fed. 359; *Covington v. South Covington &c. St. Ry. Co.*, 147 Ky. 326, 144 S. W. 17; *Butte Water Co. v. Butte*, 48 Mont. 386, 138 Pac. 195; *Reed v. Trenton*, 80 N. J. Eq. 503, 85 Atl. 270; *Bounds v. Hubbard City*, 47 Tex. C. A. 233, 105 S. W. 56.

² *New York v. New York City Ry. Co.*, 193 N. Y. 543, 86 N. E. 565.

³ *Merrifield v. Canal Commr's*, 212 Ill. 456, 72 N. E. 405.

continued, is entitled to great, if not controlling weight, for it shows how the makers understood their own contract.¹ There can be no sound basis for a claim of practical construction in the absence of knowledge of the facts and circumstances to which the construction relates. No practical construction, therefore, will arise from the fact that a public body overpaid its contractor, if when such overpayments are discovered, further payments are refused.² Parties may be bound by estoppel to accept a practical construction put upon a contract by themselves.³

§ 194. Evidence to Aid Construction.

As shown in the preceding sections, where the terms of a contract are uncertain or obscure, the court may avail itself of all lawful aids through evidence which will shed light upon the intention of the parties and upon the rights granted upon the one side and the obligations assumed upon the other.⁴ All of this should, of course, be done fairly, without enlarging rights or increasing obligations and with the sole purpose in mind of enforcing the contract of the parties and not of making a new contract for them.

Thus the manner in which a prior contract between the same parties with precisely the same terms as the one sued upon was understood, may be shown for the purpose of ascertaining the proper execution of the second contract.⁵ It will not be supposed that contractors agreed to

¹ Carthage T. P. Mills *v.* Carthage, 200 N. Y. 1, 93 N. E. 60.

² Burroughs *v.* Sch. Dist., 155 Wis. 426, 144 N. W. 977.

³ Walker *v.* U. S., 143 Fed. 685. See Bowers Hyd. D. Co. *v.* U. S., *supra*; State *ex rel.* South Bend *v.* Mountain Spring Co., 56 Wash. 176, 105 Pac. 243.

⁴ St. Louis *v.* St. Louis & S. F. R. Co., 228 Mo. 712, 129 S. W. 691; Stover *v.* Springfield, 167 Mo. App. 328, 152 S. W. 122; Douglass *v.* Morrisville, 89 Vt. 393, 95 Atl. 810; County *v.* Katz-Craig Cont. Co., 181 Iowa, 1313, 165 N. W. 422.

⁵ Bray *v.* U. S., 46 Ct. Cl. 132.

bear losses which might occur by reason of defects in a plan imposed upon them against their objections, especially when such defects might have been foreseen and guarded against by the public body through the exercise of ordinary care and skill.¹ Where in the plans and specifications it is provided to build a dam to lines and levels and in another place to build it upon solid rock and in some places the lines and levels do not meet solid rock, evidence to determine the true interpretation of the contract may be resorted to.² Warrants issued by public bodies are admissible to show the construction which the parties themselves placed upon the contract while it was being performed and was in force.³ While it is a general rule, that the construction of a written instrument is a question of law for the court,⁴ when its interpretation depends upon the sense in which the words were used, or the sense in which the promisor had reason to believe the promisee understood them, or depends upon facts aliunde in connection with the written language to ascertain the intent of the parties, the question becomes a mixed question of law and fact,⁵ and is to be determined by a jury.⁶ In other words, when in the construction of a contract a legal principle is not involved, but merely a determination as to whether facts presented in evidence come within the provisions of the contract, legally construed, such a question of construction is a question of fact to be determined

¹ *Moore v. U. S.*, 46 Ct. Cl. 139.

² *Douglass v. Morrisville*, *supra*.

³ *Mobile County v. Lynch*, 198 Ala. 57, 73 So. 423.

⁴ *Trustees of Easthampton v. Vail*, 151 N. Y. 463, 45 N. E. 1030; *Fellows v. Dorsey*, 171 Mo. App. 289, 157 S. W. 995; *Keefer v. Sunbury School Dist.*, 203 Pa. St. 334, 52 Atl. 245.

⁵ *Trustees of Easthampton v. Vail*, 151 N. Y. 463, 45 N. E. 1030.

⁶ *Norton v. Shields*, 132 Fed. 873, 143 Fed. 802; *Kiebertz v. Seattle*, 84 Wash. 196, 146 Pac. 400.

by a jury.¹ But evidence under this rule may not go to the extent of allowing parties to prove their construction of a contract.²

§ 195. Subject-Matter of Contract—Scope and Extent of Meaning—Conditions at Site.

If a party, for a sufficient consideration, agrees to erect and complete a building upon a particular site and find all the materials, and do all the labor, his agreement is to erect and complete. No matter what the expense he must provide such a substruction as will sustain the building upon that spot, until it is complete and delivered to the public body. If it cannot be erected without driving piles, he must drive them, because he has agreed to do everything necessary to erect and complete. If the difficulties are apparent on the surface, he must overcome them. If they are not, but become apparent by excavation or sinking the building or structure, the rule is the same. He must overcome them because he has agreed to do so. There is no distinction between accidents that could be foreseen when the contract was made and those that could not, between accidents by the fault of the contractor and those where he is without fault, they all rest upon the simple principle that where his promise is absolute, it must be performed, if performance be not absolutely impossible.³ Of course, each case depends upon the terms of the contract involved. In like manner where a contractor constructed a road across a swamp and agreed to keep it in repair for a year and after the road was finished it sank from its new grade, by reason of the

¹ *Tomasek v. Edwardsville*, 183 Ill. App. 493; *Internat. Cont. Co. v. U. S.*, 47 Ct. Cl. 158.

² *Indep. Sch. Dist. v. Swearingen*, 119 Iowa, 702, 94 N. W. 206.

³ *Trenton v. Bennett*, 27 N. J. L. 513.

instability of the ground, he is required to restore the road to the grade required by the contract without additional compensation. This is because his agreement was absolutely made with full knowledge of the existence of the swamp or of all the facts at his command, and when his work of refilling is done it is but the performance of his contract for which he received the agreed price.¹ Where, however, under such a contract a street has been completed and accepted and the street sinks and there is no agreement to keep in repair, the contractor is not bound to again fill in the street.² There are many circumstances which change such a result as where representations or warranties of conditions at the site are made by the public body, upon which the contractor has the right to rely,³ or plans showing the results of examinations of the site are made the basis of bids.⁴ Where the contractor agrees to clear the site and to grade the surface for a specified distance around the building, a reasonable construction requires him to remove any high ground within the foundation walls, and he cannot allow a mound to remain in the center of the site higher than the floor of the structure, or put the cost of its removal upon the public body.⁵ Where the plans require a cellar of a stated depth, he must find a foundation to hold the building even if to do so he must dig deeper than the cellar level.⁶ Under a contract with a public body for the equipping of a pier

¹ *Riley v. Brooklyn*, 46 N. Y. 444. See *Tompkins v. Dudley*, 25 N. Y. 272.

² *Duncan v. Cordley*, 199 Mass. 299, 85 N. E. 160, 17 L. R. A. N. S. 697.

³ *Hollerbach v. U. S.* 233 U. S. 165, 58 L. Ed. 898; *U. S. v. Atlantic Dredging Co.*, 253 U. S. 1, 64 L. Ed. 735; *U. S. v. Spearin*, 248 U. S. 132, 63 L. Ed. 166; *Christie v. U. S.*, 237 U. S. 234, 59 L. Ed. 933; *Sexton v. Chicago*, 107 Ill. 323; *Long v. Athol*, 196 Mass. 497, 82 N. E. 665; *Bd. of Water Comm'rs v. Robbins*, 82 Conn. 623, 74 Atl. 938.

⁴ *Faber v. New York*, 222 N. Y. 255, 118 N. E. 609.

⁵ *Fonder v. U. S.*, 48 Ct. Cl. 198.

⁶ *Trenton v. Bennett*, *supra*.

by which the public body agreed to build hatchways and to select a pattern of elevators, if alterations in the hatchways became necessary to permit the elevators approved by the public body to be operated therein, the obligation rested on the latter to make such alterations rather than the contractor.¹ Subsidence of soil at the site is ordinarily assumed by one who undertakes to erect a structure upon a particular site,² but not unforeseen conditions due to the fault of the public body, through its negligent omission to repair its own structures at the site.³ He has the right to assume that a means existing to perform some work in connection with the contract will be in working order and will operate to do what is expected of it.⁴ And when such an instrumentality is required to be built at the site, the contractor who builds it has the right to expect it to be sufficient to accomplish the purpose at the site for which it is provided.⁵

§ 196. Representations of Fact as to Conditions of Work under Contract—Person Making Them Bound and Must Bear Loss.

Where a contract or specifications forming part of it speak with certainty as to a part of the conditions or the substance or character of materials to be encountered in the course of the performance of the work, the public body is bound thereby. If the public body by these writings assures the contractor of the character or nature of conditions or materials, such will be presumed to be a matter

¹ *North Eastern Cons. Co. v. New York*, 217 N. Y. 320, 112 N. E. 53.

² *Simpson v. U. S.*, 172 U. S. 372, 43 L. Ed. 482, aff'g 31 Ct. Cl. 217; *Der-mott v. Jones*, 2 Wall. (U. S.) 1, 17 L. Ed. 762; *U. S. v. Spearin*, 248 U. S. 132, 63 L. Ed. 166.

³ *Sundstrom v. State*, 213 N. Y. 68, 106 N. E. 924.

⁴ *Horgan v. New York*, 160 N. Y. 516, 55 N. E. 204.

⁵ *U. S. v. Spearin*, 248 U. S. 132, 63 L. Ed. 166.

concerning which it speaks with knowledge and authority.¹ Such positive assertions of the nature or condition of the work are representations upon which a contractor has a right to rely without an investigation to prove their falsity, and this is true although there may be general language in portions of the contract requiring an independent investigation of the facts.² When loss results from representations which prove mistaken, these positive statements of fact must be taken as true and binding upon the public body, and accordingly such loss must be borne by it rather than by the contractor.³ Where the matters set out do not amount to representations and the burden is put upon the contractor by the contract he must take the burdens which he thus assumes.⁴ Where the contractor has been misled by erroneous statements in the specifications he may have relief in equity.⁵ In a contract to reconstruct a building partially destroyed by fire, where the contract called for the uninjured parts to remain and the government actually stripped and dismantled the burnt building, what was left standing constituted under the circumstances a representation that it

¹ *Hollerbach v. U. S.*, 233 U. S. 165, 58 L. Ed. 898; *U. S. v. Atlantic Dredging Co.*, 253 U. S. 1, 64 L. Ed. 735; *U. S. v. Smith*, 256 U. S. 11, aff'g 54 Ct. Cl. 119; *Christie v. U. S.*, 237 U. S. 234; *Y. S. v. Spearin*, 248 U. S. 132, 63 L. Ed. 166; *Bd. of Water Comm'rs v. Robbins*, 82 Conn. 623, 74 Atl. 938; *Sexton v. Chicago*, 107 Ill. 323; *Long v. Athol*, 196 Mass. 497, 82 N. E. 665; *Faber v. New York*, 222 N. Y. 255, 118 N. E. 609; *Horgan v. New York*, 160 N. Y. 516, 55 N. E. 204; *King v. Duluth*, 78 Minn. 155, 80 N. W. 874; *Capital City B. & P. Co. v. Des Moines*, 136 Iowa, 243, 113 N. W. 835.

² *Hollerbach v. U. S.*, *supra*. *U. S. v. Spearin*, *supra*, *Long v. Athol*, *supra*, *U. S. v. Atlantic Dredging Co.*, *supra*.

³ *Hollerbach v. U. S.* *supra*. *Sexton v. Chicago*, *supra*. *Bd. of Water Comm'rs v. Robbins*, *supra*.

⁴ *Rowe v. Peabody*, 207 Mass. 226, 93 N. E. 604; *Semper v. Duffey*, 227 N. Y. 151, 124 N. E. 743; *Simpson v. U. S.*, 172 U. S. 372, 43 L. Ed. 482, aff'g 31 Ct. Cl. 217; *Callahan Con. Co. v. U. S.*, 47 Ct. Cl. 177; *Lewman v. U. S.* 41 Ct. Cl. 470; *Foubnation Co. v. State*, 193 N. Y. App. Div. 513.

⁵ *U. S. v. Utah &c. Stage Co. Co.*, 199 U. S. 414, 424, 50 L. Ed. 251, aff'g 39 Ct. Cl. 420; *Long v. Athol*, *supra*.

had been adjudged so far uninjured that it was to remain, upon the faith of which a contractor might rely in making his estimate.¹ But a contractor may not rely upon representations or expressions of opinion made by an engineer, nor may he rely upon the knowledge or conduct of individual members of a board. Neither the engineer nor the individual members can bind the public body. It is represented only by its entire board, not by the individuals who compose the board, and can only be bound by the action of the board directly or through agents empowered to act or speak for it.²

¹ U. S. *v.* Gibbons, 109 U. S. 200, 27 L. Ed. 906, *aff'g* 15 Ct. Cl. 174.

² *San. Dist. of Chicago v. Ricker*, 91 Fed. 833.

CHAPTER XXX

PRIVITY OF CONTRACT

§ 197. Who may Enforce—Contract for Benefit of Third Persons.

One who is a stranger to a contract, to its consideration and obligations, has no right to enforce it. He can neither claim a benefit nor sustain a liability under it.¹ Such was the rule of the common law. A more liberal modern rule provides that where a contract is made between two persons upon a valuable consideration whereby a third person is to be paid money or receive some benefit such third person may enforce the contract although not named therein.² But to entitle such third person to recover it is necessary that the contract should have been entered into for his benefit, and if it appears from the terms used that the contract was solely for the benefit of the parties thereto, third persons cannot recover under its provisions.³ Although the distinction was formerly made only in favor of a simple contract, the rule now is that the doctrine applies to written agreements under seal, even though the

¹ *Evans v. U. S.*, 42 Ct. Cl. 287; *St. Louis v. Wright Cont. Co.*, 202 Mo. 451, 101 S. W. 6.

² *Coster v. Mayor*, 43 N. Y. 399, 411; *Little v. Banks*, 85 N. Y. 258; *Smyth v. New York*, 203 N. Y. 106, 96 N. E. 409; *Bradley v. McDonald*, 218 N. Y. 351, 361, 113 N. E. 340; *Rigney v. N. Y. C. & H. R. Co.*, 217 N. Y. 31, 111 N. E. 226; *Pond v. New Rochelle W. Co.*, 183 N. Y. 330, 76 N. E. 211; *Schnaier v. Bradley Cont. Co.*, 181 N. Y. App. Div. 538; *Searles v. Flora*, 225 Ill. 167, 80 N. E. 98; *Albin Co. v. Comm.*, 128 Ky. 295, 108 S. W. 299; *St. Louis v. Von Phul*, 133 Mo. 565, 34 S. W. 843; *St. Louis v. Wright Cont. Co.*, 202 Mo. 451, 101 S. W. 6; *Gorrell v. Greensboro W. S. Co.*, 124 N. C. 328, 32 S. E. 720; *Nashville v. Toney*, 10 Lea (Tenn.). 643.

³ *Searles v. Flora*, *supra*; *Decatur v. Jaudon*, 136 Ga. 854, 72 S. E. 351; *St. Louis v. Wright Cont. Co.*, 202 Mo. 451, 101 S. W. 6.

third person is not privy to the consideration.¹ To apply this doctrine, in the case of residents of a city under a public contract made by a municipality with its contractor, it should appear, that there was an intent on the part of the municipality to secure some benefit to its residents and further, that there was some obligation or duty owing from the municipality to the resident, which gives the latter a legal or equitable claim to the benefit of the contract, and which makes him in privity with the municipality so as to enable him to bring his action against the contractor.² Where a contract between a city and a railroad company contained a covenant that the latter would pay damages resulting to any person or property from the work to be done, including damages resulting from change of grade of the street, which it would pay at its own expense and assume such liability, the intent on the part of the municipality to benefit abutting property is clear. The words can be read in no light but to show an intent that the railroad should pay change of grade damages and these could only relate to those whose property abutted the work. The obligation or duty essential to exist between the municipality and the landowner arises from the fact that the municipality is under some obligation to protect its inhabitants and when it enters into a contract for public work, which may result in damage to one of such inhabitants, for which otherwise he would be without a remedy, the municipality may require the contractor to compensate the person injured.³

¹ *Coster v. Albany, supra*; *Rigney v. N. Y. C. & H. R. Co. supra*; *Pond v. New Rochelle W. Co., supra*.

² *Smyth v. New York, supra*; *Rigney v. N. Y. C. & H. R. Co., supra*; *Schnaier v. Bradley Cont. Co., supra*.

³ *Rigney v. N. Y. C. & H. R. Co., supra*; *Schnaier v. Bradley Cont. Co., supra*.

In like manner the contractor with the city for construction of the first subway in New York was held liable for the negligence of a subcontractor which caused the explosion of a dynamite magazine and destroyed part of the Murray Hill Hotel, under a clause which made the principal contractor liable for all damages done to abutting property resulting from negligence during the performance of the work.¹ Similarly where a water, light or railroad company in consideration of the right to lay and maintain its water, light or rail lines through the streets of a municipality, enters into a contract to furnish the public service undertaken at a rate not to exceed a sum stated, an individual resident may have an injunction restraining the company from enforcing collection of a rate in excess of that fixed by the contract.² Where the provisions of a public contract which impose upon the contractor responsibility for all damages is merely a contract of indemnity, to save the public body harmless, no action upon such a contract or its covenants may be maintained by third persons who otherwise would have no cause of action.³

¹ *Smyth v. New York*, *supra*.

² *Pond v. New Rochelle W. Co.*, *supra*.

³ *Corrigan Trans. Co. v. Sanitary Dist.*, 125 Fed. 611, 137 Fed. 851.

CHAPTER XXXI

QUALITY OF CONTRACT

§ 198. Joint and Several Contracts.

An obligation entered into by more than one person is presumed to be joint, and a several responsibility will not arise, except by words of severance.¹ But a contract may not be joint when interpreted with reference to the nature of the work. Where a contract does not require a public body to place curbstones around all the trees upon a street, its terms cannot be construed as requiring that the entire work proposed should be finished as a condition precedent to the right to recover of any abutter for the work done, against his premises.²

§ 199. Entire or Severable Contracts.

There is no general rule which can be formulated and applied in every case to determine whether a contract is entire or severable. Like other questions of construction, it is one to be determined by the intention of the parties as gathered from the light shed by the surrounding circumstances.

Some of the tests suggested are whether the consideration is single or is capable of apportionment, and whether the work is single or divisible.³ It is no doubt the general

¹ *Phila. v. Reeves*, 48 Pa. St. 472; *Henry v. Mt. Pleasant Tp.*, 70 Mo. 500; *New Orleans v. Ripley*, 5 La. 122, 25 Am. D. 175. See *Geer v. Tenth Sch. Dist.*, 6 Vt. 76; *U. S. v. Price*, 9 How. (U. S.) 83, 13 L. Ed. 56.

² *Springfield v. Harris*, 107 Mass. 532.

³ *Chicago v. Sexton*, 115 Ill. 230, 2 N. E. 263; *Coburn v. Hartford*, 38 Conn. 290; *Bridgeport v. Scott Co.*, 94 Conn. 461, 109 Atl. 162; *McCauley v. Brooks*,

rule that where the considerations moving from each party to the other are practically concurrent, the contract is indivisible, and a failure by the public body to pay the consideration is, therefore, a bar to an action for not rendering the service which the contractor is obligated to render under the contract, when the action is brought by the party failing to pay.¹

§ 200. Entire and Severable Contracts—Divisibility of Consideration Determining.

So, where the compensation for the whole job of repairing a bridge is to be determined by the amount of lumber wrought into the bridge, the contract is entire.² Again, where the contract is to pay weekly estimates only when the work progresses in accordance with the contract, a contractor who encounters difficulties in loose soil may not stop this work and go on with rock excavation and recover. Such a contract is indivisible, which must be performed or broken as a whole, and the fact that payments are to be made in installments will not of itself make the contract severable.³ A contract to pay when the contract shall be wholly carried out, completed and accepted, the subject of which is to furnish, deliver, set and fix complete all the iron work in a city hall, is not divisible, merely because the amount to be paid is made up by stating the estimated cost of each story separately and the roof, and then adding the whole together. If there is nowhere an agreement to receive and pay for the work by stories, but on the con-

16 Cal. 11; *Young v. Chicopee*, 186 Mass. 518, 72 N. E. 63; *Nat. Cont. Co. v. Comm.*, 183 Mass. 89, 66 N. E. 639; *U. S. Trust Co. v. Guthrie Center*, 181 Iowa, 992, 165 N. W. 188. See *Quigley v. County of Sumner*, 24 Kan. 293.

¹ *State ex rel. South Bend v. Mountain Spring Co.*, 56 Wash. 176, 105 Pac. 243.

² *Young v. Chicopee*, 186 Mass. 518, 72 N. E. 63.

³ *National Cont. Co. v. Comm.*, 183 Mass. 89, 66 N. E. 639.

trary the payment is to be made of the aggregate amount when the contract is wholly carried out, the contract is entire.¹ Where the method of payment or the severance of items of price or work amount to an apportionment of the consideration to separate portions of the contract, this will make the contract severable.² When a contract is for an entire term of five years, the payments by the State to be made in monthly installments, and the consideration consists not merely of these payments, but of many improvements to be made, the contract is incapable of apportionment, and the contract is entire.³ If a contract is to erect a schoolhouse and the contract price is payable in installments as the work progresses, such a division is made, not to apportion the price to different parts of the work, but to meet the wants of and aid the contractor in completing the work. It is not intended to sever the entirety of the contract and make the payment of the installments, payments for such parts of the work, as might be done when they were payable. The consideration of the covenant to complete is the whole price and a contractor cannot, therefore, after payment of part of the installments, refuse to go on and complete and yet retain that part of the price he has received.⁴

§ 201. Entire and Severable Contracts—Divisibility of Work or Objects of Contract as Determining.

Where a contract consists of three separate items of employment, the validity of the latter two of which depends upon the adoption of preliminary plans and the voting of bonds or the raising of funds by some other methods

¹ *Chicago v. Sexton*, 115 Ill. 230, 2 N. E. 263.

² *State v. Scoggin*, 10 Ark. 326.

³ *McCauley v. Brooks*, 16 Cal. 11, 38.

⁴ *Trenton v. Bennett*, 27 N. J. L. 513; *Tompkins v. Dudley*, 25 N. Y. 272.

for the construction of a waterworks system, the contract is divisible, the latter part being dependent upon terms and conditions which never became effective.¹ If a contract is made for the preparation of plans and specifications and for superintending the erection of a building and one sum is to be paid for the entire service, this is an entire contract in object and price covering all of these services.² Where a contract provides for the construction of several objects of work, and there is but one written instrument covering all the undertakings, if it sets forth several contracts, each of which relates to each undertaking or one contract covering several independent and separable subjects, it may be held good as to some and invalid as to others.³ But where the performance of several items of work cannot be enforced because the contract as to them is invalid, and the contract is indivisible, no part of the contract can be separately enforced.⁴ Where covenants are severable they are enforceable. A covenant to supply free water to a house is no longer binding if the house is so enlarged as to lose its identity and the measure of what would be a reasonable supply is no longer ascertainable. But a similar covenant to supply a reasonable amount of free water to farm buildings is severable and enforceable.⁵

§ 202. Entire and Severable Contracts—Estoppel.

Where by his own act a contractor places the construction of divisibility upon a contract and operates under such a construction for many years, he will be estopped from

¹ *Tecumseh v. Burns*, 30 Okla. 503, 120 Pac. 270.

² *Spalding County v. Chamberlin*, 130 Ga. 649, 61 S. E. 533.

³ *Hart v. New York*, 201 N. Y. 45, 94 N. E. 219; *Uvalde A. P. Co. v. New York*, 128 App. Div. 210, 198 N. Y. 548, 92 N. E. 1105.

⁴ *Ness v. Board of Comm'rs*, 178 Ind. 221, 98 N. E. 33.

⁵ *Hadham Rural Council v. Crallan*, 83 L. J. Ch. 717.

pleading its indivisibility, and he cannot claim the benefit of that portion of the contract which subserves his interest and repudiate that portion which provides for the performance of a duty on his part.¹

¹ State *ex rel.* South Bend *v.* Mountain Spring Co., 56 Wash. 176, 105 Pac. 243.

CHAPTER XXXII

COVENANTS AND CONDITIONS

§ 203. **Dependent and Independent Covenants.**

Whether a covenant is a dependent or an independent covenant must be determined according to the meaning and intention of the parties to it.¹ This intention must be gathered from the contract according to the ordinary rules of construction, and one of the infallible tests is whether or not a breach can be compensated for in damages. If it can be, then the covenants are held to be independent and a party must pay for what he receives under the contract, but may recoup the damages he has suffered by a breach upon the part of the other party. If a breach cannot be compensated for in damages, then the covenants are dependent, and must of necessity be so, else there could be no remedy at all. Where it is therefore the intention to rely upon a provision for performance and not on a remedy for non-performance, then performance is a condition precedent, and must be shown before recovery can be had upon the contract.² If the intent of the parties is that performance by the public body shall be conditioned on performance by the contractor, the covenants are independent. Where a franchise was granted upon condition that

¹ *Curran Print. Co. v. St. Louis*, 213 Mo. 22, 111 S. W. 812; *Daly v. Carthage* 143 Mo. App. 564, 128 S. W. 265; *Quinlan v. Green County*, 157 Fed. 33, 19 L. R. A. N. S. 857, aff'd 211 U. S. 582, 53 L. Ed. 335; *Wiley v. Athol*, 150 Mass. 426, 23 N. E. 311.

² *Daly v. Carthage*, *supra*.

certain enlargements and improvements of a water system should be made, the covenant is dependent, cannot be compensated in damages and no recovery can be had for water furnished until its performance.¹ But where a water company agreed to furnish water of a certain pressure, this provision must be considered as an independent collateral covenant which it was not necessary to prove was performed to entitle a recovery. The furnishing of water was the principal thing, to which everything else is subordinate under such a covenant, and if the principal covenant or guaranty is not performed, the public body may recoup any damages which it suffers by reason of defective performance.² The requirement that a bond shall be given for the faithful performance of a contract, to be approved by the comptroller and mayor of a city, in the absence of provision in the ordinance showing it to be a condition precedent, is a mutual and independent covenant, and where a good and sufficient bond is tendered and approved by the comptroller, but the mayor refuses to approve, the cancellation of his name by the comptroller upon the contract is nugatory and the contract is complete without the mayor's approval.³ Where a purchaser of lands from a county engaged to introduce certain settlers within a certain time and made certain engagements as to reclaiming, and the performance of these was not made a condition but rested in covenant, the agreement, although a part of the consideration of the contract, is independent, and non-performance raises an action merely and will not annul the entire contract. It is, therefore, only where covenants are mutual and dependent that the failure of one party to perform absolves the

¹ *Daly v. Carthage*, *supra*.

² *Wiley v. Athol*, 150 Mass. 426, 23 N. E. 311. See *Comanche v. Hoff*, 170 S. W. (Tex.) 135.

³ *Curran Print. Co. v. St. Louis*, *supra*.

other and authorizes him to rescind the contract.¹ Where a railroad company contracts with a municipality in consideration of permission to use its streets to keep the space between the tracks in repair under the direction of such competent authority as the common council might designate, the failure of the common council to make the designation is not an indispensable prerequisite to the performance of such covenant. It is not a condition precedent, but a mere reservation of a right of supervision.² Where in a contract a city undertakes as a fundamental, single and indivisible agreement to deliver all its ashes, rubbish and street sweepings from a certain territory at fourteen specified dumps with picking privileges, and in return for which the contractor, by like single and indivisible agreement, promises to perform labor at the entire collection of dumps and make payment for the privilege in an undivided sum of money, one agreement in its entirety is the foundation for and consideration of the other. When the city fails to furnish four out of the fourteen dumps, the city commits a material breach of its contract. The default is not of a covenant which is incidental, inconsequential or subordinate, but of a mutual and dependent covenant which lies at the basis of the entire agreement, goes to its entire consideration, affects the contractor's entire obligation thereunder and gives him a right of rescission.³

§ 204. Conditions Precedent and Subsequent.

The question whether the performance of a stipulation in a contract is a condition precedent to the performance of other stipulations in it, depends upon the order in which

¹ *Emigrant Co. v. County of Adams*, 100 U. S. 61, 25 L. Ed. 563.

² *Brooklyn v. Brooklyn City R. R. Co.*, 47 N. Y. 475.

³ *Clarke Cont. Co. v. New York*, 229 N. Y. 413, 128 N. E. 241.

the parties intend the several stipulations to be performed. Calling stipulations conditions is not conclusive. If, from the contract or other circumstances, it appears that it was not the intention of the parties to make their performance conditions precedent, they will not be considered such.¹ Conditions are not favored, and a provision will not be construed to be a condition, unless the intention to make it such is manifest. The judicial inclination is to construe the language of an agreement as a covenant if it can be so resolved.² The destructive results, which follow a construction that particular language constitutes a condition, will not be permitted unless the essential features of a condition appear.³ Acceptance of a contract is acceptance of its conditions whether a party expressly binds himself to them or not.⁴

A conditional contract is one, the performance of which, depends on a condition. Whether a given stipulation is to be considered a condition precedent, a condition subsequent, or an independent agreement, is purely a question of intent to be determined by examining not only the words of the particular clause, but also the language of the whole contract, as well as the nature of the act required to be done and the subject-matter to which it relates.⁵ No particular form of words is necessary to create the condition. It is likewise a difficult question oftentimes to decide whether a stipulation is a covenant or a condition. The difference relates largely to the remedy. If the breach of a contract pertains to the validity of the instru-

¹ *Quinlan v. Green County*, 157 Fed. 33, 19 L. R. A. N. s. 857, aff'd 211 U. S. 582, 53 L. Ed. 335.

² *Idem.*

³ *Idem.*

⁴ *Storm v. U. S.*, 94 U. S. 76, 24 L. Ed. 42; *Quinlan v. Green County*, *supra*.

⁵ *Quinlan v. Green County*, *supra*; *Bucksport & B. R. Co. v. Brewer*, 67 Me. 295; *Skowhegan W. Co. v. Skowhegan*, 102 Me. 323, 66 Atl. 714.

ment or is a ground for forfeiture, it is a condition. On the other hand, if the remedy for the breach is merely an action for damages, the stipulation breached is a covenant. The breach of a covenant is not ground for termination. A party must perform, and sue later for damages for breach of the covenant.¹

A contract to supply street lamps, connect them with necessary gas mains, and supply the necessary gas for street lighting was affected by an order made under the Defense of the Realm Act restricting lighting and later extinguishing all lighting. Where the contract price was an annual sum per lamp it was impossible to allocate payments to these respective items. Since the order did not make lighting permanently unlawful, or the contract absolutely impossible of performance, the supplying of gas could not be held to be a condition precedent to the right of the company to recover the payments provided by the contract.² While sometimes the words "upon condition," "provided that," "so that" and other like phrases, may be helpful in determining whether particular language imports a condition,³ they are not conclusive.⁴

¹ *Daly v. Carthage*, 143 Mo. App. 564, 128 S. W. 265; *Wiley v. Athol*, 150 Mass. 426, 23 N. E. 311.

² *Leiston Gas Co. v. Leiston-cum-Sizewell Urban Council*, 85 L. J. K. B. 1759. See *Metropolitan Water Board v. Dick*, 87 L. J. K. B. 370, aff'g 86 L. J. K. B. 675, for the effect upon the contract where a like order made the contract unlawful.

³ *Curran Printing Co. v. St. Louis*, 213 Mo. 22, 111 S. W. 812.

⁴ *Green County v. Quinlan*, 211 U. S. 582, 53 L. Ed. 335, aff'g 157 Fed. 33, 19 L. R. A. N. s. 857; *Bell v. Boston*, 101 Mass. 506. See *Mercer County v. Coovert*, 6 Watts & S. 70; *State v. Collins*, 6 Ohio, 126.

CHAPTER XXXIII

TIME IN CONTRACT

§ 205. Time of Performance.

If a contract is silent as to the time of performance or payment, the law implies that a reasonable time was intended.¹

§ 206. Duration of Contract.

Where contracts are made by ordinance, for a named period, as for example, a contract, designating a paper for the publication of legal notices, and the publication continues after such period the contract is valid. If it does not appear that the designation was revoked, or the employment terminated, the presumption is that the employment continues. Until rescinded in terms the resolution lasting as an expression of determination to have its work done at certain rates and as to all but the party, is perpetual until rescinded by action of the city. Its continuance beyond the named period gives a valid basis to constitute a binding continuing contract.²

If there is no hint at any limitation of time in a grant but the public body grants all the right and authority that it has the capacity to grant, to a railroad, lighting, water, telephone or other public service company to construct, hold and operate its lines on certain named streets, such a grant is perpetual if the public body has authority

¹ *McArthur v. Cheboygan*, 156 Mich. 152, 120 N. W. 575; *Boesen v. Potter County*, 173 S. W. (Tex.) 462; *Gustavino v. U. S.*, 50 Ct. Cl. 115.

² *Argus Co. v. Mayor*, 55 N. Y. 495; *Matter of Phillips*, 60 N. Y. 16.

to make a perpetual grant.¹ A contract which on its face purports to endure forever and to confer a perpetual franchise, will not be construed as a grant for a definite period, namely, limited to the life of the company holding the grant, since it is *ultra vires* and void.² While it is the policy of the law to declare contracts of this character unenforceable if for an indefinite time or an unreasonable period, upon the theory that a municipality exercising its power to contract may not for an unreasonable time fasten upon its residents rates and obligations impossible of change,³ yet where these contracts are not *malum in se*, there is a strong tendency to sustain the grant as valid to the extent at least that it does not transcend a reasonable or lawful period. Since it is only the excess which offends the policy of the law, grants will be declared invalid only as to the time unauthorized.⁴ Any rights of duration or occupation must appear in plain terms and not equivocally, as any ambiguity in the terms of a grant will be resolved in favor of the public body. Whatever is not unequivocally granted is withheld and nothing will pass to a grantee by mere implication.⁵ Where parties express no period of duration and no definite time can be implied from the nature of the contract or the circumstances surrounding its making, it

¹ *Covington v. So. Covington St. Ry. Co.*, 246 U. S. 413, 62 L. Ed. 802; *Northern Ohio Trac. Co. v. Ohio*, 245 U. S. 574, 62 L. Ed. 481; *Owensboro v. Owensboro W. Wks. Co.*, 243 U. S. 166, 61 L. Ed. 650; *Owensboro v. Cumberland T. & T. Co.*, 230 U. S. 58, 57 L. Ed. 1389.

² *Westminster v. Westminster W. Co.*, 98 Md. 551, 56 Atl. 990.

³ *Home Tel. Co. v. Los Angeles*, 211 U. S. 265, 53 L. Ed. 176, *aff'd* 155 Fed. 554; *Mobile Elec. Co. v. Mobile*, 201 Ala. 607, 79 So. 39 L. R. A. 1918 F. 687.

⁴ *Mobile Elec. Co. v. Mobile*, *supra*; *Columbus Water Wks. v. Columbus*, 48 Kan. 99, 28 Pac. 1097; *Oregon S. Nav. Co. v. Winsor*, 20 Wall. (U. S.) 64, 22 L. Ed. 315.

⁵ *Knoxville W. Co. v. Knoxville*, 200 U. S. 22, 50 L. Ed. 353; *Blair v. Chicago*, 201 U. S. 400, 50 L. Ed. 801; *Mitchell v. Dakota Tel. Co.*, 246 U. S. 396, 62 L. Ed. 793.

is unreasonable to impute an intention to make its duration perpetual. The only reasonable intention to impute is that the contract may be terminated by either on his giving reasonable notice of his intention to the other.¹

¹ Childs v. Columbia, 87 S. C. 566, 70 S. E. 296.

CHAPTER XXXIV

COMPENSATION

§ 207. Construction—Compensation—Rules Controlling.

Where the compensation specified in a contract is a percentage of the contract price, or of the total cost of construction, the recovery is limited to the amount specifically named in the contract as the sum contemplated by the parties, and it will not be extended so as to give a percentage of a sum paid for superior efficiency of an article sold or to cover damages paid by the public body for its breach of the contract beyond the contract price.¹ The contract price will generally control so far as it can be made applicable.² Where no price is mentioned, the law implies a price which is reasonable.³

¹ *Chicago v. Hunt*, 227 Ill. 130, 81 N. E. 243; *Boller v. New York*, 117 N. Y. App. Div. 458.

² *Quigley v. Summer County*, 24 Kan. 293; *Elgin v. Joslyn*, 136 Ill. 525, 26 N. E. 1090.

³ *Murtagh v. Dist. of Columbia*, 10 D. C. 455; *Elgin v. Joslyn*, *supra*; *Eigemann v. Posey County*, 82 Ind. 413.

CHAPTER XXXV

ASSIGNMENT OF CONTRACT

§ 208. Operation—Assignment of Contract.

The general rule is that an executory contract not necessarily personal in its character, which can, consistent with the rights and interests of the adverse party, be sufficiently executed by the assignee, is assignable in the absence of other agreement in the contract.¹ If the service to be rendered or the condition to be performed is not necessarily personal, involves no relation of confidence or the exercise of personal skill or science, or such as considering the contract obligation can only be performed by the original contractor, its assignment will not operate as a rescission of or constitute a cause for terminating the contract.² The assignment may include all contingent and incidental benefits or results of an executory contract, as well as the earnings under it and thus entitle the assignee to the damages flowing from its violation. This right of action for damages for the breach would survive to the personal representative of the injured party, and such survival is one test of assignability.³ Moneys due and to grow due may be assigned even before the doing of the work or the performance of the conditions upon which the payments depend. These expectancies, as well as existing rights of action, may be assigned and

¹ *Devlin v. Mayor*, 63 N. Y. 8; *Munsell v. Lewis*, 2 Denio, 224; *St. Louis v. Clemens*, 43 Mo. 395; *Philadelphia v. Lockhardt*, 73 Pa. St. 211; *Chapin v. Pike*, 184 Mass. 184, 68 N. E. 42; *Ernst v. Kunkle*, 5 Ohio St. 520.

² *Devlin v. Mayor*, *supra*.

³ *Devlin v. Mayor*, *supra*.

the rights of the assignees protected and enforced.¹ If the contract is personal, and performance by the party is of its essence, then it cannot devolve upon his representatives and so cannot be assigned, at least without consent.²

Therefore the general rule is that public contracts can be assigned without violating public policy so long as the public body retains the personal obligation of the original contractor and his sureties for its faithful performance. In the absence of contract or statutory provision prohibiting it, such an assignment is valid.³

§ 209. Operation—Assignment of Contract—Statute and Contract Prohibition.

In most cases where public contracts are now let by the Nation, State or municipality, provision is inserted therein under statutory sanction forbidding their assignment.⁴

In the case of government contracts it is provided that if the contract is assigned the government is discharged from all liability thereunder and the contract becomes invalidated.⁵

Some provisions of contract require that the consent of the public body shall be obtained in writing to the assignment and that in the absence of such consent no right

¹ *Field v. Mayor*, 2 Seld. (N. Y.) 179; *Hall v. Buffalo*, 2 Abb. N. Y. Ct. of App. Dec. 301; *Devlin v. Mayor*, *supra*.

² *Devlin v. Mayor*, *supra*; *White's Ex'rs. v. Commonwealth*, 39 Pa. St. 167; *Pike v. Waltham*, 168 Mass. 581, 47 N. E. 437; *Delaware County v. Diebold Safe Co.*, 133 U. S. 473, 488, 33 L. Ed. 674.

³ *Devlin v. Mayor*, *supra*; *Harris v. Baltimore*, 73 Md. 22; *Fortunato v. Patten*, 147 N. Y. 277, 41 N. E. 572; *Murphy v. Plattsmouth*, 78 Neb. 163, 110 N. W. 749.

⁴ See various statutes and charters.

⁵ *Burck v. Taylor*, 152 U. S. 634, 38 L. Ed. 578; *Hobbs v. McLean*, 117 U. S. 567, 29 L. Ed. 940; *Goodman v. Niblack*, 102 U. S. 556, 26 L. Ed. 229; *Francis v. U. S.*, 11 Ct. Cl. 638, *aff'd* 96 U. S. 354, 24 L. Ed. 663; *Dulaney v. Scudder*, 94 Fed. 6; *R. S. of U. S.*, §. 3737, Comp. Stat., § 6890.

under the contract nor to any moneys to grow due by its terms may be asserted against the public body. These provisions do not render assignments void which are made without obtaining the consent of the public body.¹ They are inserted solely for the benefit of the public body and will operate to prevent any claim being asserted against it in the absence of consent.² While it is a shield to protect the public body, it cannot be used as a weapon between several assignees to defeat the rights of a senior assignee who fails to secure the necessary consent.³ Such a provision of the contract forbidding assignment without the consent of the public body may be waived.⁴ It has the right to refuse to recognize an assignment made without its consent or to refuse to have any dealings with the assignee under it. Where it deals with and recognizes him, makes payments to him and accepts the work, the failure to consent in writing to the assignment becomes immaterial and the assignee acquires equitable rights which entitle him to the money in the possession of the public body.⁵ These provisions have been variously construed. Some authorities favor a strict construction of the terms. Others favor a liberal construction toward the public body. A prohibition against assigning the contract has been considered to prevent an assignment of

¹ *Fortunato v. Patten*, 147 N. Y. 277, 41 N. E. 572.

² *Fortunato v. Patten*, *supra*; *Welles v. Portuguese Am. Bk.*, 211 Fed. 561; *Dulaney v. Scudder*, 94 Fed. 6, 10; *Federal Mfg. & P. Co. v. U. S.*, 41 Ct. Cl. 318; *Omaha v. Standard Oil Co.*, 55 Neb. 337, 75 N. W. 859; *Burnett v. Jersey City*, 31 N. J. Eq. 341.

³ *Fortunato v. Patten*, *supra*; *Dulaney v. Scudder*, 94 Fed. 6.

⁴ *Brewster v. Hornellsville*, 35 N. Y. App. Div. 161; *Staples v. Somerville*, 176 Mass. 237, 57 N. E. 380.

⁵ *Staples v. Somerville*, *supra*; *Taber v. Ferguson*, 109 Ind. 227, 9 N. E. 723; *McCubbin v. Atchison*, 12 Kan. 166; *Bk. of Harlem v. Bayonne*, 48 N. J. Eq. 246, 21 Atl. 478; *Dickson v. St. Paul*, 97 Minn. 258, 106 N. W. 1053; *Norton v. Roslyn*, 10 Wash. 44, 38 Pac. 878; *Ocorr & Rugg v. Little Falls*, 77 N. Y. App. Div. 592, 608, 178 N. Y. 622, 70 N. E. 1104.

a single installment.¹ But it would seem that one could assign the benefits of performance, so long as he retained the burdens and the obligation of performance, without violating a provision which did not at the same time forbid an assignment of the moneys to grow due.² Such an assignment is not an assignment of the contract.³ An assignment of part of the contract or an equitable assignment does not fall within the prohibition of such a provision.⁴ Neither does a judicial sale of the contract,⁵ nor a partnership change,⁶ nor an assignment in bankruptcy⁷ nor a voluntary assignment.⁸ Contracting with a third party to furnish material for the work does not violate the federal statute.⁹ The defense of the invalidity of such an assignment to be availed of must be pleaded.¹⁰

¹ *Omaha v. Standard Oil Co.*, *supra*.

² *Lowry v. Duluth*, 94 Minn. 95, 101 N. W. 1059; *Dickson v. St. Paul*, *supra*. *Fortunato v. Patten*, *supra*; *Snyder v. New York*, 74 N. Y. App. Div. 421; *Episcopo v. Mayor*, 35 Misc. 623.

³ *Brace v. Gloversville*, 167 N. Y. 452, 60 N. E. 779; *Snyder v. New York*, *supra*.

⁴ *Ocorr & Rugg v. Little Falls*, *supra*; *Hinkle Iron Co. v. Kohn*, 229 N. Y. 179, 128 N. E. 113.

⁵ *St. Paul & R. Co. v. U. S.*, 112 U. S. 733, 28 L. Ed. 861, aff'g 18 Ct. Cl. 405. See *Prairie State Bank v. U. S.*, 164 U. S. 227, 41 L. Ed. 412, aff'g 27 Ct. Cl. 185.

⁶ *Hobbs v. McLean*, 117 U. S. 567, 29 L. Ed. 940.

⁷ *Erwin v. U. S.* 97 U. S., 392, 24 L. Ed. 1065 aff'g 13 Ct. Cl. 49

⁸ *Goodman v. Niblack*, 102 U. S. 556, 26 L. Ed. 229.

⁹ *U. S. v. Farley*, 91 Fed. 474.

¹⁰ *Burke v. Mayor*, 7 N. Y. App. Div. 128.

CHAPTER XXXVI

EXTRA WORK

§ 210. What It Is.

The term extra work usually includes all work required by a change of plan. It is difficult to conceive of extra work without a change of plan, and the fair construction of contracts which have inserted a provision for extra work is to include all work within such term which is necessitated by such changes, whether termed incidental or fundamental.¹ Extra work is work arising outside and entirely independent of the contract, something not required in its performance. Additional work on the other hand, is something necessarily required in the performance of the contract and without which it could not be carried out. The necessity for additional work, usually arises from conditions which cannot be anticipated and which are not open to observation and cannot be discovered until the specified work under the contract is actually undertaken.² Extra work has again been defined to consist of labor or materials not called for by the original contract.³ It denotes something done or furnished in addition to, or in excess of, the requirements of the contract, something not required in its performance.⁴ These questions relating

¹ *Peole ex. rel. McCabe v. Snedeker*, 106 N. Y. App. Div. 89, 182 N. Y. 558, 75 N. E. 1133.

² *Shields v. New York*, 84 N. Y. App. Div. 502.

³ *Casgrain v. Milwaukee*, 81 Wis. 113, 51 N. W. 88; *Malloy v. Briarecliff Manor*, 145 N. Y. App. Div. 483; *U. S. Wood Preserving Co. v. New York*, 138 *Id.* 841. See *Coryell v. Dubois Borough*, 226 Pa. St. 103, 75 Atl. 25.

⁴ *Fullerton v. Des Moines*, 147 Iowa, 254, 126 N. W. 159.

to extra work depend for their decision upon the terms of particular contracts. Where the construction of an entire work is provided for at a fixed compensation, the hazards of it are assumed by the contractor, and if it turns out that he has made a mistake in his estimate or that the work is more expensive or difficult than he anticipated, he cannot ask for compensation for such unforeseen difficulties under the guise of extra work.

§ 211. Whether Work Is, Depends upon True Construction of Contract—Entirety.

Whether work is extra work depends upon a proper construction of each contract, its objects and purposes, the intention of the parties and what was within the contemplation of the parties as the work to be done.¹ Even though a contractor is to do a particular work for a sum total, payable in installments, so that the contract is an entire contract, this fact is not always controlling. The manner and means of doing the work may determine the question of extra work. If the contract is absolute to deliver a completed structure, that result must be accomplished even though parts of the work may have to be done several times and no claim for extra work may arise. But if the contract is to build a completed structure with materials furnished by the public body and the work proves insufficient, whether it be a tunnel which caves in because the timbering furnished by the public body is insufficient or the sand or cement or brick so furnished and used in a tunnel or a wall of a structure proves inferior and therefore the work becomes insecure, or because work done by some other contractor proves

¹ *Uvalde Asphalt Pav. Co. v. New York*, 154 App. Div. 112, 211 N. Y. 560, 105 N. E. 1100; *U. S. v. Gibbons*, 109 U. S. 200, 27 L. Ed. 906, aff'g 15 Ct. Cl. 174.

unstable,—in these and like cases the work to be done over again is clearly not within the contract, not within the contemplation of the parties, and its character as extra work cannot be governed by any principle of entirety of contract. The contractor is entitled to be paid where the extra work is caused by the fault of the other party.¹ So, where there is error in fixing grades and the public body has full knowledge of it and compels a contractor to proceed against his objection and extra work is thus occasioned, the public body is liable.²

§ 212. May not be Claimed where Work is Included in Contract or is Voluntarily Performed.

Work included in a contract, work or materials voluntarily performed or furnished without request and without knowledge of the public body afford no basis for a claim of extra work.³ If on a reading of the entire contract it would appear that the intention of the parties was to include the work in dispute within the contract, it cannot be claimed to be extra work.⁴ A practical con-

¹ *Becker v. New York*, 53 N. Y. App. Div. 301, 170 N. Y. 219, 63 N. E. 298; *Becker v. New York*, 77 N. Y. App. Div. 635, mod. O. G. 176 N. Y. 441, 68 N. E. 855.

² *Idem*.

³ *Duncan v. Miami County*, 19 Ind. 154; *West Chicago P. C. v. Kincade*, 64 Ill. App. 113; *Davies v. East Saginaw*, 66 Mich. 37, 32 N. W. 919; *O'Brien v. Mayor*, 65 Hun, 112, 139 N. Y. 543; *Gartner v. Detroit*, 131 Mich. 21, 90 N. W. 690; *Erickson v. U. S.*, 107 Fed. 204; *Shipman v. Dist. of Columbia*, 18 Ct. Cl. 291, 119 U. S. 148, 30 L. Ed. 337; *McFerran v. U. S.*, 39 Ct. Cl. 441; *Braden v. U. S.*, 16 Ct. Cl. 389.

⁴ *Langford v. Manchester*, 196 Mass. 211, 81 N. E. 884; *Palladino v. New York*, 56 Hun, 565, 125 N. Y. 733, 26 N. E. 757; *Crocker v. Buffalo*, 90 N. Y. 351; *Rens v. Grand Rapids*, 73 Mich. 237, 41 N. W. 263; *Burns v. New York*, 69 N. Y. App. Div. 214; *Costa v. Cranford*, 75 N. J. L. 542, 68 Atl. 160; *Morgan v. Baltimore* 58 Md. 509; *Merrill Ruckgaber Co. v. U. S.*, 241 U. S. 387, 60 L. Ed. 1058, aff'g 49 Ct. Cl. 553; *Sells v. Chicago*, 201 Fed. 874; *Connors v. U. S.*, 141 Fed. 16; *Beattie v. McMullen*, 82 Conn. 484, 74 Atl. 767; *Geary v. New Haven*, 76 Conn. 84, 55 Atl. 584; *Rathbun v. State*, 15 Idaho, 273, 97 Pac. 335.

struction by the parties as to whether work is extra work or is included in the contract will be given consideration in deciding the question.¹

§ 213. Duty to Make Claim for Payment or Protest.

It is highly important, especially in public contracts, that claims growing out of changes in the contract should be promptly asserted, so that the public authorities will know what a public work is costing as it progresses and not be subjected to large increases in cost based upon stale claims presented years after the event.² Where a contractor accepts progress payments running over a long period of time, without a suggestion by way of presentation of a bill, reservation of a claim or protest of any sort, indicating that there has been any loss or disadvantage or that the contractor had any claim growing out of compliances with directions of the engineer upon the work, the public body cannot be held liable. The reasonable time to make the claim is before the work is done. If, therefore, a contractor is ordered to make changes and makes them without protest and later accepts payments and gives a receipt in full without protest or reservation, he ratifies the changes and cannot recover for same as extra work.³ When, however, extra work is done by a contractor with knowledge of the public body to whom the contractor makes a claim that he expects to be paid therefor, an implied promise will arise to pay for such extra work.⁴ Unless he objects, the contractor's assent is presumed

¹ *Dist. of Columbia v. Gallaher*, 124 U. S. 505, 31 L. Ed. 526, aff'g 19 Ct. Cl. 564; *Fulton County v. Gibson*, 158 Ind. 471, 63 N. E. 982.

² *Ryan v. New York*, 179 N. Y. App. Div. 181; *Driscoll v. U. S.*, 34 Ct. Cl. 508. See *Burnham v. Milwaukee*, 100 Wis. 55, 75 N. W. 1014.

³ *Peck v. U. S.*, 14 Ct. Cl. 84; *Martin v. U. S.*, 5 Ct. Cl. 215.

⁴ *Gibbons v. U. S.*, 15 Ct. Cl. 174, aff'd 109 U. S. 200, 27 L. Ed. 906; *Cooper v. U. S.*, 8 Ct. Cl. 199.

where the change ordered is of a kind that would not reasonably be assumed to increase the cost. But where it will necessarily increase the cost, his assent is not presumed, and if he does not expressly assent he may recover the amount of such increase.¹ But in municipal contracts, if the work is clearly outside the contract and the competitive bidding statutes control, this rule cannot apply.²

§ 214. Authority of Engineer or Architect to Order.

The engineer or architect appointed by the public body to supervise the work is its special agent merely and has no power to bind the public body beyond the express authority conferred upon him by the contract. The acts of an architect or engineer in ordering extra work are their individual acts and cannot be regarded as the acts of the public body, except in so far as they are authorized by resolution or by contract.³ An oral promise by the architect, even if founded upon a sufficient consideration, to pay for the work sued for as extra work, if made without authority, is not binding upon the public body.⁴ Unless authority is shown in an engineer or architect, none will be implied.⁵ If extra work is performed with the knowledge or consent or at the direction of the public body, it becomes liable therefor.⁶

¹ *Ford v. U. S.*, 17 Ct. Cl. 60; *Dale v. U. S.*, 14 Ct. Cl. 514; *Merch. Exch. Co. v. U. S.*, 15 Ct. Cl. 270.

² *Borough Cons. Co. v. New York*, 200 N. Y. 149, 93 N. E. 480.

³ *Long v. Pierce County*, 22 Wash. 330, 61 Pac. 142; *Allen v. Melrose*, 184 Mass. 1, 67 N. E. 1060; *People ex rel. McCabe v. Snedeker*, 106 N. Y. App. Div. 89, 182 N. Y. 558, 75 N. E. 1133; *Becker v. New York*, 176 N. Y. 441, 68 N. E. 855; *Beattie v. McMullen*, 82 Conn. 484, 74 Atl. 767; *Sexton v. Cook County*, 114 Ill. 174, 28 N. E. 608; *Eigemann v. Posey County*, 82 Ind. 413; *Wood v. Ft. Wayne*, 119 U. S. 312, 30 L. Ed. 416; *Dale v. U. S.*, 14 Ct. Cl. 514; *Merchants' Exch. Co. v. U. S.*, 15 Ct. Cl. 270; *Dialogue v. U. S.*, 22 Ct. Cl. 196; *Collins v. U. S.*, 34 Ct. Cl. 294.

⁴ *Stuart v. Cambridge*, 125 Mass. 102.

⁵ *Dillon v. Syracuse*, 9 N. Y. Supp. 98.

⁶ *Gibson County v. Motherwell I. & S. Co.*, 123 Ind. 364, 24 N. E. 115;

§ 215. Order or Request for Extra Work—Must Come from One with Authority.

A departure from the terms of a contract can find no legal justification unless it is done at the direction or by the request of one clothed with authority to change its provisions. Therefore, any change or modification of a contract by which extra work is entailed must be directed or requested by those empowered to change or add to the terms of a contract or at least must be done by the acquiescence of the public body.¹ The authority of the officer will not be implied.

§ 216. Provision for Order in Writing.

Where the contract provides that changes increasing the cost of work, or increasing or diminishing the cost must be agreed on in writing with the contractor and the architect or engineer, and there is a failure to comply with these provisions, no recovery may be had.² In like manner

O'Dea v. Winona, 41 Minn. 424, 43 N. W. 97; *Steffen v. St. Louis*, 135 Mo. 44, 36 S. W. 31; *Messenger v. Buffalo*, 21 N. Y. 196.

¹ *Bonesteel v. Mayor*, 22 N. Y. 162; *People ex rel. McCabe v. Snedeker*, 106 N. Y. App. Div. 89, 182 N. Y. 558, 75 N. E. 1133; *Becker v. New York*, 176 N. Y. 441, 68 N. E. 855; *Wormstead v. Lynn*, 184 Mass. 425, 68 N. E. 841; *Boston Elec. Co. v. Cambridge*, 163 Mass. 64, 39 N. E. 787; *Addis v. Pittsburgh*, 85 Pa. St. 379; *Leathers v. Springfield*, 65 Mo. 504; *West Chicago Pk. Comm. v. Kincaide*, 64 Ill. App. 113; *Griffith Co. v. Los Angeles*, 54 Pac. (Cal.) 383; *Ferris v. U. S.*, 28 Ct. Cl. 332; *Merchants' Exch. Co. v. U. S.*, 15 Ct. Cl. 270; *Murphy v. U. S.*, 13 Ct. Cl. 372; *Plumley v. U. S.*, 226 U. S. 545, 57 L. Ed. 342; *Phoenix B. Co. v. U. S.*, 211 U. S. 188, 53 L. Ed. 141, aff'g 38 Ct. Cl. 492; *Bd. of Imp. Comm'rs v. Galbraith*, 123 Ark. 619, 185 S. W. 474.

² *Duncan v. Miami County*, 19 Ind. 154; *Russell v. Sa Da Bandeira*, 13 C. B. n. s. 149, 32 L. J. C. P. n. s. 68, 9 Jur. n. s. 718, 7 L. T. n. s. 804; *Heard v. Dooly County*, 101 Ga. 619, 28 S. E. 986; *Archer v. Franklin County*, 78 Wash. 20, 138 Pac. 299; *Bentley v. Davidson*, 74 Wis. 420, 43 N. W. 139; *Johnson v. Albany*, 86 N. Y. App. Div. 567; *McLaughlin v. Bayonne*, 75 N. J. L. 106, 66 Atl. 1070; *Condon v. Jersey City*, 43 N. J. L. 452; *McManus v. Philadelphia*, 201 Pa. St. 619, 51 Atl. 322; *Duluth v. McDonnell*, 61 Minn. 288, 63 N. W. 727; *King v. Duluth*, 78 Minn. 155, 80 N. W. 874, 81 Minn. 182, 83 N. W. 526; *Watterson v. Nashville*, 106 Tenn. 410, 61 S. W. 782; *Monarch v. McDonogh Sch. Fund*, 49 La. Ann. 991, 22 So. 259; *Capital City &c. Co. v. Des Moines*, 136 Iowa, 243, 113 N. W. 835.

where, as in some contracts, there must be in addition the approval by a particular officer, without such the contractor cannot recover, although it may be a hard case, since the extra work is not ordered in the manner required by the contract.¹ And a contractor may not rely upon the oral order of the engineer.² These provisions of the contract that the extra work shall be ordered in writing and that unless so ordered the public body shall not be liable therefor, constitute a condition precedent to any payment for extra work.³

§ 217. The Same—Engineer or Architect may not Waive.

The provision of a public contract that a contractor will not make any claim for extra work unless it is performed in pursuance of written contracts or orders cannot be waived by the engineer or architect in charge of the work.⁴

§ 218. The Same—Waiver—Estoppel.

When the public body itself having the power to make the contract authorizes and directs the doing of extra work, it will be estopped from contending that the contractor may not recover therefor, because the contract requires that an agreement or an order in writing should be

¹ *Plumley v. U. S.*, 226 U. S. 545, 57 L. Ed. 342; *Hawkins v. U. S.* 96 U. S. 689, 24 L. Ed. 607 aff'g 12 Ct. Cl. 181; *Millen v. Boston*, 217 Mass. 471, 105 N. E. 453.

² *Bd. of Commrs. v. Galbraith*, 123 Ark. 619, 185 S. W. 474; *Huntington v. Force*, 152 Ind. 368, 53 N. E. 443; *Rens v. Grand Rapids*, 73 Mich. 237, 41 N. W. 263; *Cashman v. Boston*, 190 Mass. 215, 76 N. E. 671; *Stuart v. Cambridge*, 125 Mass. 102; *Abells v. Syracuse*, 7 N. Y. App. Div. 501; *Cincinatti v. Cameron*, 33 Ohio St. 336; *McManus v. Philadelphia*, 201 Pa. St. 619, 51 Atl. 322; *Carson v. Dawson*, 129 Minn. 453, 152 N. W. 842.

³ *O'Brien v. New York*, 139 N. Y. 543, 35 N. E. 323; *Millen v. Boston*, 217 Mass. 471, 105 N. E. 453; *Plumley v. U. S.*, 226 U. S. 545, 57 L. Ed. 342.

⁴ *Malloy v. Briarelliff Manor*, 145 N. Y. App. Div. 403, 491; *Van Buskirk v. Bd. of Educ. Passaic Tp.*, 78 N. J. L. 650, 75 Atl. 909.

made concerning it.¹ Such waiver may be shown by oral evidence.²

§ 219. Ratification of Act of Engineer in Failing to Issue Written Order.

A public body may ratify the act of its engineer or other officer who fails to order in writing extra work as required by the terms of its contract. Having full knowledge of the situation, if the public body recognizes the claim as valid by paying a part thereof and by accepting the work as performed, this will amount to a ratification of the act of the engineer in orally ordering the extra work, since this is equivalent to an original authority in writing.³ But declarations of one or more or even all of the council members that they would be willing to consent to changes and allow extra pay for increased work, will not bind. The public body is bound by the council acting as a body when duly convened, not by the several members acting as individuals.⁴ But while ratification may under some circumstances be inferred from receipt of benefits of performances, it will not be inferred unless by some express act of the council or governing body. No inference that it intends to accept any work performed without its authority or consent will be indulged even from the fact that the work done or structure erected is afterwards used by the

¹ *Dwyer v. New York*, 77 N. Y. App. Div. 224; *Hasbrouck v. Milwaukee*, 21 Wis. 217; *Elgin v. Joslyn*, 36 Ill. App. 301, aff'd 136 Ill. 525, 26 N. E. 1090; *Gibson County v. Motherwell I. & S. Co.*, 123 Ind. 364, 24 N. E. 115; *Bartlett v. Stanchfield*, 148 Mass. 394, 19 N. E. 549; *Douglass v. Morrisville*, 89 Vt. 393, 95 Atl. 810; *Abell v. Syracuse*, 7 N. Y. App. Div. 501; *Long v. Pierce County*, 22 Wash. 330, 61 Pac. 142; *Van Buskirk v. Bd. of Educ. Passaic Tp.*, 78 N. J., L. 650, 75 Atl. 909; *Braden v. U. S.*, 16 Ct. Cl. 389; *Riverside Tp. v. Stewart*, 211 Fed. 873.

² *Long v. Pierce County*, *supra*.

³ *Abells v. Syracuse*, 7 N. Y. App. Div. 501.

⁴ *Murphy v. Albina*, 22 Oreg. 106, 29 Pac. 353. See *Rowe v. Peabody*, 207 Mass. 226; 93 N. E. 604.

public.¹ An officer who has no authority to contract has no authority to ratify. The acceptance and use of a building into which has been put unauthorized extra work, will not bind the public body to pay for it, even though it is beneficial. The public body may not decline to use the building and refuse acceptance, on the ground that it contains such work, and since it is not bound to take out the extra or unauthorized work, acceptance and use of the building is not proof of ratification.² Certificates of performance and completion of a contract which is illegal are not conclusive evidence of the validity of the very contract which provides for them and cannot be considered as ratifying extra work improperly ordered.³

§ 220. Provision that Order in Writing must be Obtained Therefor—When not Applicable.

When the contract provides that the contractor shall make no claim for extra work unless the same is agreed upon in writing, such a provision can only relate to work not within the contract, but has no application to changes and alterations in the work intended to be covered by the agreement. Where these changes and alterations are made by competent authority, recovery may be had for them without a written order.⁴ So where there is a change in the manner of doing the specified work, this is not a change or modification of the contract and a written order is not required.⁵ Where conditions at the site prove to be not as

¹ *Murphy v. Albina*, *supra* and cases cited; *Zottman v. San Francisco*, 20 Cal. 86, 81 Am. Dec. 96.

² *Boston Elec. L. Co. v. Cambridge*, 163 Mass. 64, 39 N. E. 787.

³ *Hart v. New York*, 201 N. Y. 45, 94 N. E. 219.

⁴ *Dwyer v. New York*, 77 N. Y. App. Div. 224; *Wood v. Ft. Wayne*, 119 U. S. 312, 30 L. Ed. 416; *Long v. Pierce County*, 22 Wash. 330, 61 Pac. 142; *Carson v. Dawson*, 129 Minn. 453, 152 N. W. 842. See *Beattie v. McMullen*, 80 Conn. 161, 67 Atl. 488; *Roemheld v. Chicago*, 231 Ill. 467, 83 N. E. 291; *Clark & Sons Co. v. Pittsburg*, 217 Pa. St. 46, 66 Atl. 154.

⁵ *U. S. v. Barlow*, 184 U. S. 123, 46 L. Ed. 463.

represented, and a radical change of plan becomes necessary thereby, and it conclusively appears that the decision of the engineer that all work rendered necessary by such change was included in the contract is arbitrary and because of a mistake of fact, the refusal of the engineer to issue a written order which was requested will not bar a recovery.¹ Where the provision for written order relates to extra work it will not cover additional work² and where it is required for alterations or changes it is not essential for extra work.³

§ 221. Done by Order of Public Body—Liability.

Where a contractor is required to perform extra services not embraced within the contract and the changes are made by the order of the engineer and the public body, the latter having ordered and required a change is not in a situation to defeat a contractor who obeys its orders and requirements. The public body will not be permitted to repudiate its own acts at the expense of the contractor, who does what is exacted of him.⁴

§ 222. Caused by Acts of Public Body by Ordering Superior Grade of Work or Material than Required—Making Work More Expensive.

When a public body requires a contractor to do work superior in quality to that which the contract specifies or compels the use of materials of superior grade to that indicated in the contract, and the work or materials so furnished are not provided voluntarily, but under order of the

¹ *King v. Duluth*, 78 Minn. 155, 80 N. W. 874, 81 Minn. 182, 63 N. W. 727.

² *Shields v. New York*, 84 N. Y. App. Div. 502.

³ *Beattie v. McMullen*, *supra*.

⁴ *Bd. of Hamilton County v. Newlin*, 132 Ind. 27, 31 N. E. 465. See cases *ante*, § 214 note 3.

engineer and against the protest of the contractor, the latter is entitled to recover their reasonable value.¹ Some jurisdictions deny the right of recovery upon the basis of an implied obligation to pay for the excess value, and place the liability to respond in damages for breach of contract.²

§ 223. **Where Work Specified is Made More Expensive to do Through Act of Public Body—Where Less Expensive.**

If a public body, by its own act, causes the work to be done by a contractor to be more expensive than it otherwise would have been according to the terms of the original contract, it is liable to him for the increased cost or extra expense.³ Because, however, a public body prescribes a less amount of work to be done will not authorize a claim that the work specified shall be paid for at a less rate than the contract provides. The public body has a right to demand the very work specified, but, if it accepts anything less as sufficient, it has no right to insist upon a rebate for that reason.⁴ But if it is expressly provided in the contract that where changes in the work reduce the

¹ *Beattie v. McMullen*, 80 Conn. 160, 67 Atl. 488; *White v. New Orleans*, 15 La. Ann. 667; *Barlow v. U. S.*, 35 Ct. Cl. 514, 184 U. S. 123, 46 L. Ed. 463; *Hawkins v. U. S.* 12 Ct. Cl. 181, 96 U. S. 689, 24 L. Ed. 607; *Callahan Cons. Co. v. U. S.*, 47 Ct. Cl. 229.

² See cases § 230 *post*.

³ *Horgan v. Mayor*, 160 N. Y. 516, 55 N. E. 204; *Brady v. Mayor*, 132 N. Y. 415, 30 N. E. 757; *Mulholland v. Mayor*, 113 N. Y. 631, 20 N. E. 856; *Messenger v. Buffalo*, 21 N. Y. 196; *Lentilhon v. New York*, 102 N. Y. App. Div. 548, 185 N. Y. 549 77 N. E. 1190; *Dwyer v. Mayor*, 77 N. Y. App. Div. 224; *McCann v. Albany*, 11 *Id.* 378, 158 N. Y. 634, 53 N. E. 673; *Becker v. New York*, 176 N. Y. 441, 68 N. E. 855; *Gearty v. Mayor*, 171 N. Y. 61, 63 N. E. 804; *King v. Duluth*, 78 Minn. 155, 80 N. W. 874, 81 Minn. 182, 83 N. W. 526; *O'Neill v. Milwaukee*, 121 Wis. 32, 98 N. W. 963; *Chicago v. Duffy*, 218 Ill. 242, 75 N. E. 912; *Bd. of Hamilton County v. Newlin*, 132 Ind. 27, 31 N. E. 465.

⁴ *Kingsley v. Brooklyn*, 78 N. Y. 200; *Finucane Co. v. Bd. of Education*, 190 N. Y. 76, 82 N. E. 737; *Beinhauer v. Gleason*, 15 N. Y. St. R. 227, 119 N. Y. 658, 23 N. E. 1150; *Brabazon v. Seymour*, 42 Conn. 551.

cost of the work, the contract price shall be reduced proportionately, such provision will be enforced.¹

Where a contract is modified with the consent of the public body and certain requirements as to the drying and finishing of floors were eliminated which resulted in a saving of cost to the contractor, the public body is not entitled to a reduction of the contract price nor to a counterclaim for the amount saved. It is only where it can be shown that the materials become injured because of the omission, or were inferior to that required by the specifications that any basis for a claim by the public body could arise.²

§ 224. Where Public Body Increases Work to be Done— Changing Conditions at Site.

Where a contractor is obliged to remove filling or other obstructions placed upon the line of the work by other contractors, changing the condition of the site as it originally was, and increasing the amount of the contractor's work, the public body is liable for the additional cost. Such work cannot be considered either as an obstruction or incumbrance or as a change of condition within the contemplation of a clause of the contract putting upon the contractor the burden of meeting these.³

§ 225. Where Contract Requires Complete Performance for Gross Sum—Mistake in Plans.

It is a general rule that if a contractor interposes a gross bid for the entire performance of a given work, he assumes the risk as to the nature and quantity of the work to be

¹ *Beinhauer v. Gleason*, 15 N. Y. St. R. 227, 119 N. Y. 658, 23 N. E. 1150; *Connors v. U. S.*, 141 Fed. 16; *Dale v. U. S.*, 14 Ct. Cl. 514.

² *Finucane v. Bd. of Educ.*, *supra*.

³ *Rogers v. New York*, 71 N. Y. App. Div. 618, 173 N. Y. 623, 66 N. E. 1115; *Thilemann v. New York*, 82 N. Y. App. Div. 136; *U. S. v. Gibbons*, 109 U. S. 200, 27 L. Ed. 906, *aff'g* 15 Ct. Cl. 174.

performed, even though approximate estimates of the quantities which are materially wrong have been prepared by the public authorities for the guidance of bidders.¹ Accordingly if a contractor, to remove the walls of a reservoir for such gross sum is required to do considerable more work because the plan does not show correctly the angle of slope, he may not recover therefor,² even though the quantities could only be determined by a careful mathematical calculation from the plan on the assumption that it was drawn to scale.³

§ 226. Representations in Plans and Specifications which Prove Erroneous.

If a contractor in reliance upon a representation of existing conditions at the site of work set out in the specifications or plans is subsequently required, because the representations prove untrue, to perform extra work or incur additional expense, he is entitled to recover the reasonable value of such extra work or expense entailed.⁴ So also if certain appliances are furnished by the public body and represented to accomplish certain results, within the contemplation of the contract, during its performance,⁵ or are to be constructed to accomplish such a purpose⁶ and they fail entirely or prove inadequate and

¹ *Lentilhon v. New York*, 102 N. Y. App. Div. 548, 185 N. Y. 549, 77 N. E. 1190; *Sullivan v. Pres. Sing Sing*, 122 N. Y. 389, 25 N. E. 366. See *Leary v. Watervliet*, 222 N. Y. 337, 118 N. E. 849.

² *Lentilhon v. New York*, *supra*.

³ *Lentilhon v. New York*, *supra*. See *Athol v. Long*, 196 Mass. 497, 82 N. E. 665.

⁴ *Christie v. U. S.*, 237 U. S. 234, 59 L. Ed. 933; *Hollerbach v. U. S.*, 233 U. S. 165, 58 L. Ed. 898; *U. S. v. Smith*, 256 U. S. 11, aff'g 54 Ct. Cl. 119; *Faber v. New York*, 222 N. Y. 255, 118 N. E. 609; *King v. Duluth*, 78 Minn. 155, 80 N. W. 874; *Capital City B. & P. Co. v. Des Moines*, 136 Iowa, 243, 113 N. W. 835.

⁵ *Horgan v. New York*, 160 N. Y. 516, 55 N. E. 201.

⁶ *U. S. v. Spearin*, 248 U. S. 132, 63 L. Ed. 166.

thereby extra work and expense is put upon the contractor, he may recover therefor.¹ But such a recovery is not permitted to a contractor who claims to be misled by the specifications but who with full knowledge of the facts enters into the contract.²

§ 227. Omissions and Acts of Public Body—Insufficiency of Plans and Specifications.

When a contractor performs work under a contract, and he is required to take it down and do it over or do it in a different manner by reason of the insufficiency of the plans and specifications and not from a non-compliance with such plans and specifications, he is entitled to recover the value of extra work caused thereby.³

§ 228. Where Contract Provides for Change without Compensation and Extra Work is Caused by Error of Engineer.

Where labor not within the original plan, but caused by a deviation from it is imposed upon a contractor through an erroneous change of grade caused by the engineer but not occasioned by an intentional change from that indicated upon the plan and profile, such work is not within the terms of a provision permitting a change without compensation. If in the correction of the error the contractor performs extra labor and incurs increased expense, he is entitled to recover according to its value and amount, and is not confined to the rate of compensation provided for similar work by the special contract.⁴

¹ Horgan v. New York, *supra*; U. S. v. Spearin, *supra*.

² O'Rourke v. Philadelphia, 211 Pa. 79, 60 Atl. 499.

³ Capital City B. & P. Co. v. Des Moines, 136 Iowa, 243, 113 N. W. 835; Bd. of Comm'rs, Carroll County v. O'Conner, 137 Ind. 622, 35 N. E. 1006; Murphy v. U. S. 13 Ct. Cl. 372.

⁴ Mulholland v. Mayor, 113 N. Y. 631, 20 N. E. 856.

Where extra work is made necessary because of improper and erroneous instructions of the engineers to a contractor in the blasting out of a tunnel, and extra back masonry is made necessary by reason of the negligence of such engineers, the cost of such extra work must be borne by the public body.¹

§ 229. Caused by Errors of Engineer—Work under Special Statute.

To impose liability for acts of an engineer in charge of work, the claim must be consistent with the terms of a special statute under which the work is being performed, and the contract made pursuant thereto. When work is being done by an agency of the State whose powers are limited by the terms of such special statute, which provides that in no event shall the city be made liable in an action brought upon the contract made under the statute for any greater or other obligation than that expressed in the contract, a recovery must be one wholly within and justified by the contract terms. Where accordingly extra work is caused by erroneous grades and lines furnished by the engineer and assumed to be even radical and harmful to the contractor, no recovery can be had since the action brought is necessarily an action under the contract made pursuant to the statute, and since the statute prohibited recovery for such extra cost, except in so far as it was specifically stated in the contract, no liability could arise beyond its very terms.²

§ 230. Contractor Required to do Over Again Work Already Done in Accordance with Contract.

Where a contractor is directed by the engineer to do

¹ *Chicago v. Duffy*, 218 Ill. 242, 75 N. E. 912.

² *O'Brien v. Mayor*, 139 N. Y. 543, 35 N. E. 323; *Trenton Co. v. U. S.*, 12 Ct. Cl. 147.

work a second time, already done in accordance with the contract, he may under protest comply with the directions of the engineer and recover thereafter the reasonable value of the work on the theory of a breach of contract.¹ Or where the authority is not that of an engineer but one who has authority to make the contract and to waive its provisions or change it, he may also sustain a recovery upon the theory of implied contract.² Of course, he is not bound to do the work a second time, he can stop work and stand upon his contention that the work is properly done, and bring his action to recover for labor and materials furnished under the contract and claim his prospective profits.³ Where he does the work under protest and brings an action for damages for breach of contract because he is unjustifiably required to furnish extra materials and do extra work in spite of his protest, there must be fair room for debate as to whether the directions of the engineer were or were not justified by the contract provisions. It does not matter that it turns out that the contractor was right and that the official had no right to call on him to furnish the materials and do the labor.⁴ But if the thing required is clearly beyond the limits of the contract, the contractor may not even under protest do it and subsequently recover damages.⁵ The duty of a contractor is to follow no directions which amount to

¹ *Gearty v. Mayor*, 171 N. Y. 61, 63 N. E. 804; *Dwyer v. Mayor of N. Y.*, 77 N. Y. App. Div. 224; *Lentilhon v. New York*, 102 *Id.* 548, aff'd 185 N. Y. 549, 77 N. E. 1190; *People ex rel. Powers & M. Co. v. Schneider*, 191 N. Y. 523, 84 N. E. 1118; *Borough Cons. Co. v. New York*, 200 N. Y. 149, 93 N. E. 480.

² *People ex rel. McCabe v. Snedeker*, 106 N. Y. App. Div. 89, 97, 182 N. Y. 558, 75 N. E. 1133.

³ *Gearty v. Mayor*, *supra*.

⁴ *Borough Cons. Co. v. New York*, *supra*.

⁵ *Borough Cons. Co. v. New York*, *supra*; *Becker v. New York*, 176 N. Y. 441, 68 N. E. 855; *Leary v. Watervliet*, 222 N. Y. 337, 118 N. E. 849.

material modifications of the contract, or plans and specifications. The engineer has no authority in this respect, in the absence of express authorization from the governing body or of acquiescence in a departure from the terms of the contract.¹

§ 231. Where Work Done and Materials Furnished are Outside Terms of Contract.

Where public officers have power to bind the public body for work done and materials furnished beyond the provisions of the contract, a recovery for the reasonable value thereof may be had in the absence of any agreement as to the cost of such additional labor and material.² The public body becomes liable upon an implied contract to pay the reasonable value of such extra work.³ But the contract prices so far as the work is of the same character as that of the contract will govern and will afford the basis of recovery.⁴ If these provisions cannot apply because the extra work done is different, then the rule of reasonable value applies and recovery is based upon such value.⁵ If the method provided by the contract is that a particular officer shall estimate the amount of payment to

¹ *Becker v. New York, supra.*

² *Henderson Bridge Co. v. McGrath*, 134 U. S. 260, 33 L. Ed. 934; *Thomas v. U. S.*, 32 Ct. Cl. 41; *McFerran v. U. S.*, 39 Ct. Cl. 441; *O'Hare v. Dist. of Columbia*, 18 Ct. Cl. 646; *Cooper v. U. S.*, 8 Ct. Cl. 199; *Grant v. U. S.*, 5 Ct. Cl. 71; *Gregory v. U. S.* 33 Ct. Cl. 434; *Callahan Const. Co. v. U. S.* 47 Ct. Cl. 229; *Bd. of Comm'rs Carroll County v. O'Conner*, 137 Ind. 622, 35 N. E. 1006, 37 U. S. 16; *Dwyer v. Mayor*, 77 N. Y. App. Div. 224; *Gearty v. Mayor*, 171 N. Y. 61, 63 N. E. 804; *Turner v. Grand Rapids*, 20 Mich. 390; *Hasbrouck v. Milwaukee*, 21 Wis. 217.

³ *Bd. of Comm'rs Carroll County v. O'Conner, supra*; *Elgin v. Joslyn*, 136 Ill. 525, 26 N. E. 1090.

⁴ *Harrison County Comm'rs v. Byrne*, 67 Ind. 21; *Bd. of Comm'rs Carroll County v. O'Conner, supra*; *Bd. of Comm'rs Fulton County v. Gibson*, 158 Ind. 471, 63 N. E. 982; *Elgin v. Joslyn, supra*; *Clark v. Mayor*, 4 N. Y. 338; *Merchants Exch. Co. v. U. S.*, 15 Ct. Cl. 270.

⁵ *Akin v. Bloodgood*, 12 Ala. 221; *Elgin v. Joslyn, supra*; *Bd. of Fulton County v. Gibson, supra.*

be allowed for extra work, this provision will bind.¹ Where the engineer refuses or fails to issue a written order for work of the character here considered, but does so under a claim that the work is included in the contract, and that question is debateable and not free from doubt, and the contractor does the work under protest, the contractor, when it eventually turns out that he was right, will not be precluded from recovering. His recovery will be by way of breach of contract, however, based both upon the ground of failure to perform his duty and issue the written order and for compelling the contractor to do something not fairly required by his contract. But where the engineer orders the contractor to do something clearly outside the contract he cannot do it even under protest and subsequently recover damages.² But if the public body, which has the power to make the contract, gives such a direction to a contractor, whether it insists that the work is within the contract and in fact it is clearly without the contract, is of no moment. The public body can waive the provision of the contract requiring a written order, a thing which the engineer cannot do. So that whether the work eventually is declared to be debateably or clearly outside the contract is of no concern to the courts. If the work was debateably outside or clearly without the contract provisions there is in either case a breach of contract for which the public body must respond in damages.³

¹ *Rens v. Grand Rapids*, 73 Mich. 237, 41 N. W. 263; *Hasbrouck v. Milwaukee*, 17 Wis. 266.

² *Uvalde Asphalt Pav. Co. v. New York*, 154 N. Y. App. Div. 112, 211 N. Y. 560, 105 N. E. 1100; *Borough Cons. Co. v. New York*, 200 N. Y. 149, 93 N. E. 480 (act of engineer).

³ *Gearty v. Mayor*, 171 N. Y. 61, 63 N. E. 804 (public body itself); *Dwyer v. New York*, 77 N. Y. App. Div. 224, (public body itself); *Pacific Bridge Co. c. Clackamas County*, 45 Fed. 217.

Thus where a contract calls for the grading of an existing street, the grade of which had not been legally changed when the contract was executed, and regrading was not called for by the contract, such work will not be considered as within the contemplation of the parties when the contract was made and therefore not included within the contract, and if the contractor is ordered to do such work, and performs it under protest, he may recover for a breach of his contract, in that he is required to do work not covered by his contract.¹ Where the action is thus for damages for breach of the contract, the contractor is entitled to recover according to its value and amount, and is not limited by the rate of compensation provided for similar work by the special contract.² Where a contract for street paving required a stated amount of sand beneath the pavement and the public body graded the street, so that, to conform the pavement to this grade, much more sand became necessary, the public body became liable for the extra material furnished.³

§ 232. Extra Work Caused by Failure of Public Body to Perform Its Part of Contract—or by Delay.

If the public body under its contract obligates itself to do part of the work or to furnish certain appliances at the site, or to construct them either independently, or under the contract, and it fails to do its part of the work or furnish the appliances, or if when the appliances are furnished or even constructed, they fail to operate or to accomplish the purpose which the parties intended and

¹ *Uvalde A. P. Co. v. New York*, 154 N. Y. App. Div. 112, 211 N. Y. 560, 105 N. E. 1100.

² *Mulholland v. Mayor*, 113 N. Y. 631, 20 N. E. 856.

³ *Messenger v. Buffalo*, 21 N. Y. 196. See *Allen v. Melrose*, 184 Mass. 1, 67 N. E. 1060.

upon which as a basis the parties contracted, the public body is responsible for any extra work or expense entailed through its fault.¹ So, if it delays in the doing of that which the contract requires it to do, a similar liability follows.² If it undertakes to supply a part of the materials to be used upon the construction of a building or work and extra work or expense is caused in using it and installing it into the work because it is different than the kind which the contract requires, such added cost may be recouped from the public body.³ Thus where brick is furnished by the public body which is different from the usual kind and extra expense is entailed in laying it, and the delay of the public body carries the performance of the contractor's work into the winter, and such fact causes further expense, the reasonable cost of these may be recovered.⁴ But an allowance made to a contractor for delay caused by the removal of extra fill placed upon the line of the work by another contractor is not a defense to the contractor's claim for extra work in removing the fill.⁵

§ 233. Where Estimated Quantities are Approximate only and Work or Material Ordered is Within Contemplation of Parties.

If the proposals accompanying a contract for furnishing materials for a definite period state that an approximate estimate of quantities is given and the specifications indicate that these estimates are given only as a guide

¹ *Horgan v. New York*, 160 N. Y. 516, 55 N. E. 204; *U. S. v. Spearin*, 248 U. S. 132, 63 L. Ed. 166; *Wood v. Ft. Wayne*, 119 U. S. 312, 30 L. Ed. 416; *Owen v. U. S.* 44 Ct. Cl. 440; *U. S. v. Atlantic Dredging Co.*, 253 U. S. 1, 64 L. Ed. 735.

² *Owen v. U. S.*, 44 Ct. Cl. 440; *Wood v. Ft. Wayne*, 119 U. S. 312, 30 L. Ed. 416; *U. S. v. Smith*, 256 U. S. 11, aff'g 54 Ct. Cl. 119.

³ *Owen v. U. S.*, *supra*.

⁴ *Idem*.

⁵ *Thilemann v. New York*, 82 N. Y. App. Div. 136.

to the bidder, but are in no way to bind or limit the public body as to the amount which is to be ordered, the contract entered into will bind the contractor to furnish all the classes of materials which might be required by the public body during the year and will bind the public body to pay the price agreed for all materials ordered and accepted. In such a situation the vital and essential term of the contract is to deliver all the material which the public body requires for the purposes stated. When, therefore, it orders quantities in excess of the estimated quantities the contractor is bound by the contract prices and is not entitled to be paid at market rates.¹

§ 234. Exceeding Appropriation.

In those jurisdictions in which recovery is denied, except upon a contract in writing, the municipality may not appropriate compensation for extra work except upon a contract in writing. No claim for such extra work can bind the municipality to pay for work done under the written contract but outside of it for which the municipality has paid the price stipulated in the contract. Such payment would be in excess of the original appropriation and cannot be lawfully made, and the fact that there is a further appropriation, is of no avail since there is no written contract to support its payment.²

§ 235. Where Contract Makes Provision for Extra Work at Contract Prices, these Control.

Where a change in plan is not radical, and the contract provides that alterations may be made by order of the engi-

¹ National Bldg. Supply Co. v. Baltimore, 100 Md. 188, 59 Atl. 726. See First Nat. Bk. v. Syracuse, 122 N. Y. App. Div. 172, 195 N. Y. 587, 89 N. E. 1100.

² O'Rourke v. Philadelphia, 211 Pa. St. 79, 60 Atl. 499. See Grant v. U. S. 5 Ct. Cl. 71.

neer, and if the public body increases the amount of the work, such increase shall be paid for according to the quantity actually done and at the price fixed by the contract, no claim for extra compensation may be made since such work is covered by the contract and the prices fixed by it.¹

§ 236. Provision that Same Shall be Paid for at Contract Price only Applies to Reasonably Proportionate Increase.

The provision in public contracts that the contractor shall perform such extra work or make alterations in connection with the work specified in the contract as the engineer or other officer may direct, is limited in its meaning and effect by reason, and by the object of the contract to such extra work of proportionately small amounts as is necessary to the completion of the work contemplated by the parties² and to such modifications of the contemplated work as do not radically change its nature and its cost.³ This restriction is as effectually a part of the contract as if it were written into the agreement in so many words.⁴ Therefore, where material quantities of extra work or of alterations are required, substantially variant in character and cost from that contemplated by the parties when they made their agreement, such will be considered to constitute new and different work not governed by the terms of the agreement, for which the contractors may recover its reasonable value.⁵ Sometimes under a reserved power to

¹ *Allen v. Melrose*, 184 Mass. 1, 67 N. E. 1060.

² *Salt Lake City v. Smith*, 104 Fed. 457, 465; *County of Cook v. Harms*, 108 Ill. 151; *Chicago v. McKechney*, 205 Ill. 372, 68 N. E. 954; *Elgin v. Joslyn*, 136 Ill. 525, 531, 26 N. E. 1090.

³ *County of Cook v. Harms*, *supra*; *Salt Lake City v. Smith*, *supra*; *McMaster v. State*, 108 N. Y. 542, 15 N. E. 417; *National Cont. Co. v. Hudson River W. P. Co.*, 192 N. Y. 209, 84 N. E. 965.

⁴ *Salt Lake City v. Smith*, *supra*.

⁵ *Salt Lake City v. Smith*, *supra*; *McMaster v. State*, 108 N. Y. 542, 15 N. E.

order extra work, attempts are made to make radical changes in the character of the work so that it no longer resembles the work contracted to be done. Such reserved right does not authorize a reduction in the number of wings or stories planned in a public building, or a change from stone to wood or to brick. It will not authorize a complete change in plan which is subversive of the very contract purpose, or a change in the general character of the building or work intended. While it is difficult to draw the line of limitation between what it will authorize and what it will not, it will of course include such changes as frequently occur in the process of constructing buildings or public works, in matters of taste, arrangement and details.¹ A public body contracting to build a masonry dam may not change it, under such a reserved right to make alterations, from a masonry dam to an earth dam with a masonry core.²

§ 237. Unforeseen Obstructions or Difficulties—Outside Contract.

A provision in a contract that all loss or damage arising out of the nature of the work to be done under the contract, or from any unforeseen obstructions or difficulties which may be encountered in its prosecution, only applies to the work to be done and to the unforeseen obstructions or difficulties which may be encountered under the agreement. Where an unforeseen obstruction which subjects a contractor to a large amount of extra work is entirely outside of the contract, it stands entirely unaffected by

417; *National Cont. Co. v. Hudson River W. P. Co.*, 192 N. Y. 209, 84 N. E. 965; *County of Cook v. Harms*, *supra*; *Chicago v. McKechney*, *supra*.

¹ *McMaster v. State*, *supra*; *Nat. Cont. Co. v. Hudson River W. P. Co.*, *supra*.

² *Nat. Cont. Co. v. Hudson Riv. W. P. Co.*, *supra*.

such a provision and if it relates to a duty owed by the public body to the contractor or the failure of appliances furnished for his use, it will render the former liable for the extra work caused.¹

If a contractor in the course of performance of his work encounters extraordinary conditions or unforeseen difficulties and obstructions, and on account of these the work proves more expensive, he cannot thereby recover additional compensation. Ordinarily he assumes the risk and perils of the work and unless there be some representation or warranty by the public body he cannot escape them and shift the cost in violation of the obligations of his contract.² This is especially true in those cases where his contract is an absolute contract to do all the work and furnish all necessary labor and material,³ and in those cases where the burden is placed upon him by the terms of the contract to satisfy himself of the accuracy of statements or of estimates and the public body disclaims any liability for discrepancies.⁴ Where such extra cost is consequent upon performance of the exact terms of the contract, the contractor cannot claim payment for extra work.⁵ So where a contract puts the risk from sudden influx of water into the work upon the contractor and obligates him to be prepared to remove it promptly, if the work is more laborious or more expensive than he

¹ *Horgan v. New York*, 160 N. Y. 516, 55 N. E. 204.

² *Riley v. Brooklyn*, 46 N. Y. 444; *Penn. Bridge Co. v. Kershaw County*, 226 Fed. 728; *Devlin v. Mayor*, 4 Duer, 337; *Chicago v. Duffy*, 179 Ill. 447, 53 N. E. 982; *Leavitt v. Dover*, 67 N. H. 94, 32 Atl. 156; *Owens v. Butler County*, 40 Iowa, 190.

³ *McCauley v. Des Moines*, 83 Iowa, 212, 48 N. W. 1028; *Trenton v. Bennett*, 27 N. J. L. 513.

⁴ *Mairs v. Mayor*, 52 N. Y. App. Div. 343, 166 N. Y. 618, 59 N. E. 1126; *Semper v. Duffey*, 227 N. Y. 151, 124 N. E. 743; *Kelly v. New York*, 87 N. Y. App. Div. 299, 180 N. Y. 507, 72 N. E. 1144.

⁵ *Slattery v. Mayor*, 31 N. Y. App. Div. 127, 165 N. Y. 618, 59 N. E. 1130.

anticipates he cannot rightfully ask the public body to carry a burden for him which he assumed.¹

Where a contractor agreed to keep an excavation clear of water, from whatever source, during the work, and he was required to make good any damage which his work might sustain from any cause before final acceptance, he could not make a claim against the public body for damage caused by a freshet in the river at the site of the work, and for the cost of recleaning or repainting his work.² A contractor takes the risk of the prices of labor and materials which he is bound to furnish to complete a specified job agreed to be done at a fixed price. It is of necessity one of the elements which he takes into account when he makes his bargain, and he cannot expect the other party to guarantee him against unfavorable changes in those prices.³

§ 238. Caused by Failure of Contractor to Properly Perform His Contract.

If a contractor fails to perform his contract in the manner required, but on the contrary performs his work in violation of the terms of his contract, or defectively, and extra work becomes necessary on this account, he is not entitled to recover therefor.⁴

So where a contract provided that brick which was to be placed in the walls of a school building should be thoroughly wet before being laid in the walls, and part of the walls were constructed, when the architect dis-

¹ *Burnham v. Milwaukee*, 100 Wis. 55, 75 N. W. 1014.

² *Johnson v. Albany*, 86 N. Y. App. Div. 567.

³ *Chouteau v. U. S.*, 95 U. S. 61, 24 L. Ed. 371. See *Gordon v. State*, 233 N. Y. 1.

⁴ *Phoenix Bridge Co. v. U. S.*, 211 U. S. 188, 53 L. Ed. 141, aff'g 38 Ct. Cl. 492; *Bowe v. U. S.*, 42 Fed. 761; *Archer v. Franklin County Sch. Dist.*, 78 Wash. 20, 138 Pac. 299.

covered this provision had been disregarded, and he ordered the wall torn down and replaced according to the contract, no recovery for extra work occasioned will be permitted.¹

If a contract allows false work to be used in constructing a bridge over a navigable river during the non-navigable period, the duty is imposed after that period, if the exigencies of the situation require it, to perform the work in some other suitable manner consistent with the non-interruption of navigation in the river. Therefore, if a contractor is required to erect a lift span, he may not recover therefor as the work was not extra work but clearly within the contract.²

§ 239. Decision of Engineer.

The stipulation in public contracts that all questions and differences which may arise between the public body and the contractor under the contract shall be referred to the engineer, and his decision shall be final and conclusive, does not give the engineer jurisdiction to determine that work, which is not done under the contract or specifications, and which is not governed by them, was performed under and is controlled by the agreement, and his decision to that effect is not binding.³ Not having jurisdiction of that question, he cannot confer it upon himself by erroneously deciding that he has it.⁴

Where the contract provides for a decision by the engineer on the question of extra work it is binding and conclusive,⁵ unless it is unjust, partial, dishonest, arbitrary

¹ *Archer v. Franklin County Sch. Dist.*, *supra*.

² *Phoenix B. Co. v. U. S.*, *supra*.

³ *Salt Lake City v. Smith*, 104 Fed. 457; *U. S. v. Smith*, 256 U. S. 11.

⁴ *Salt Lake City v. Smith*, *supra*.

⁵ *Long v. Pierce County*, 22 Wash. 330, 61 Pac. 142; *Hasbrouck v. Milwaukee*, 17 Wis. 266; *Kennedy v. U. S.*, 24 Ct. Cl. 122.

or palpably wrong.¹ The question whether it is just and impartial or arbitrary is for the jury.² In a case, however, where the action is not under the contract for extra work but to recover damages for breach of the contract, the production of a certificate is not necessary, since the provision requiring a certificate has no application.³ But this provision of a contract may be waived, and is waived by a modification which provides that, in event of differences the contractor shall do the work under protest. Such a provision will leave the adjudication of the contractor's rights open without impairment until after the full completion of the contract.⁴

§ 240. Conditions Precedent to Recovery for Extra Work.

Any limitations upon the time within which or the manner in which claims for extra work shall be presented or sustained must be complied with before recovery is allowed, as these are generally held to be conditions precedent to such recovery.⁵ The valuation of the work claimed as extra by the engineer is such a condition precedent.⁶ But since conditions are not favored it must appear that it was intended to be a condition precedent before the courts will so declare it.⁷ The obtaining by arbitration of an adjustment of value of extra work will

¹ *Long v. Pierce County*, *supra*; *King v. Duluth*, 78 Minn. 155, 80 N. W. 874; *O'Brien v. Mayor*, 139 N. Y. 543, 35 N. E. 323.

² *Long v. Pierce County*, *supra*.

³ *Gearty v. Mayor*, 171 N. Y. 61, 74, 63 N. E. 804.

⁴ *Galveston v. Devlin*, 84 Tex. 319, 19 S. W. 395.

⁵ *Johnson v. Albany*, 86 N. Y. App. Div. 567; *Ryder Bldg. Co. v. Albany*, 187 *Id.* 868; *Capital City B. & P. Co. v. Des Moines*, 136 Iowa, 243, 113 N. W. 835; *Burnham v. Milwaukee*, 100 Wis. 55, 75 N. W. 1014; *Beattie v. McMullen*, 82 Conn. 484, 74 Atl. 767; *Stroebel Steel Cons. Co. v. Chicago San. Dist.*, 160 Ill. App. 554.

⁶ *Kennedy v. U. S.*, 24 Ct. Cl. 122.

⁷ *Strobel v. Sanitary Dist. Chicago*, 160 Ill. App. 554.

not be considered a condition precedent to a right of action.¹

§ 241. Contractor not Bound to Perform or Public Body to Let it to Him Unless Contract so Provides.

A contract which provides for a certain definite work to be done and which does not directly or by implication obligate the contractor to do extra work, leaves the parties to the contract free in the matter of extra work. The public body may let it to the contractor, if the contractor is willing to perform it. But the public body may if it chooses let such work to another person and, on the other hand, the contractor if requested to do such work is not obligated to perform it. It is matter for new agreement of the parties.²

¹ *Preston v. Syracuse*, 92 Hun, 301, 158 N. Y. 356, 53 N. E. 39; *Milwaukee v. Hasbrouck*, 17 Wis. 266.

² See *Morgan v. Baltimore*, 58 Md. 509; *Collins v. U. S.*, 34 Ct. Cl. 294.

PART IV. RESCISSION

CHAPTER XXXVII

RESCISSION OF CONTRACT

§ 242. Rescission—Right of Public Bodies to Rescind Contracts.

Public bodies have no sovereign right to rescind agreements at their mere pleasure. Such contracts can only be rescinded under the same conditions and subject to the same liability as natural persons.¹ There is not one law for the sovereign and another for the subject. When the sovereign engages in business and the conduct of business enterprise and contracts with individuals, when such contract comes up before the court for construction, the rights and obligations of the parties must be adjusted upon the same principles as if both contracting parties were private persons. Both stand upon equality before the law and the sovereign is merged in the dealer, contractor and suitor.² After a contract has been lawfully entered into, it cannot be annulled by a public body by reconsidering its approval. A contract creates fixed and perfect legal obligations, wholly detached from a *locus pœnitentiæ* and not subject to reconsideration. It is a contradiction in terms to speak of a contract revocable at will of a contracting party.³ Mere negotiations which contemplate a written contract,

¹ People *ex rel.* Graves *v.* Sohmer, 207 N. Y. 450, 101 N. E. 164.

² People *v.* Stephens, 71 N. Y. 549; People *ex rel.* Graves *v.* Sohmer, *supra*.

³ People *ex rel.* Graves *v.* Sohmer, *supra*; Safety I. W. Co. *v.* Baltimore, 66 Fed. 140.

followed by a vote of the governing body to accept a bid, will not constitute a contract for the work and may later be reconsidered.¹ Public contracts may be discharged by mutual agreement of the parties² and of course are discharged by performance, by operation of law and by breach. One contract substituted for another discharges the latter.³ Discharge by breach may occur by one party renouncing or repudiating the contract and refusing to be further bound by it.⁴ A public body may discharge and terminate a contract by making it impossible for it to perform its part of the contract,⁵ but it may not thus discharge its liability under the contract.⁶ A contract which is void may be rescinded for that reason.⁷

§ 243. Reserved Right to Terminate.

Where the public body reserves the right to terminate the contract, the exercise of the option pursuant to such provision will be strictly construed.⁸ It may reserve the arbitrary right of termination⁹ or the right to annul for failure to properly perform the work.¹⁰ If the public body reserves the privilege to terminate in the event that the work is not done satisfactorily, reasonable grounds must exist for such dissatisfaction and the exercise of the right must

¹ *McCormick v. Oklahoma City*, 203 Fed 921.

² *Bd. of Commr's v. Speer*, 124 Ark. 337, 187 S. W. 315.

³ *Bd. of Commr's v. Speer*, *supra*.

⁴ *U. S. v. Behan*, 110 U. S. 338, 28 L. Ed. 168.

⁵ *Kingsley v. Brooklyn*, 78 N. Y. 200, 216.

⁶ *Kingsley v. Brooklyn*, *supra*; *Danolds v. State*, 89 N. Y. 36, 42 Am. Rep. 277.

⁷ *East St. Louis G. L. Co. v. East St. Louis*, 47 Ill. App. 411; *McKee v. Greensburg*, 160 Ind. 378, 66 N. E. 1009; *Hart v. New York*, 201 N. Y. 45, 94 N. E. 219.

⁸ *Cody v. N. Y.*, 71 N. Y. App. Div. 54; *People v. Coler*, 56 N. Y. App. Div. 98; *Morgan v. Baltimore*, 58 Md. 509.

⁹ *Bietry v. New Orleans*, 24 La. Ann. 21.

¹⁰ *Powers v. Yonkers*, 114 N. Y. 145, 21 N. E. 132.

be free from arbitrary action.¹ The language of the contract may be sufficiently broad to admit of absolute termination by the public body whose judgment may not be questioned, or it may be lodged with the engineer in charge to decide whether the contractor is proceeding with proper speed and diligence. His decision is final in the absence of fraud or bad faith.² But where his action has no sufficient basis to rest upon or is without any support, it will not be sustained.³ The public body cannot exercise a reserved power of annulment because of default in performance if this has been occasioned by the public body.⁴ If the power can only be exercised by giving notice, the exact notice provided must be given.⁵

§ 244. Abandonment of Right of Rescission.

The public body will be deemed to abandon its right to declare a forfeiture of the contract where it fails to expressly declare the contract forfeited, but on the other hand tacitly acquiesces in the abandonment of the contract by the contractor, and the acts of the parties will be considered to have effected a mutual abandonment and a forfeiture will not be permitted.⁶ Where all the work under several contracts has been abandoned by mutual agreement, no recovery may be had in an action for anticipated profits on the work so abandoned.⁷

¹ *Harder v. Marion Co. Commr's*, 97 Ind. 455; *Starin v. U. S.*, 31 Ct. Cl. 65; *Wakefield Con. Co. v. New York*, 157 N. Y. App. Div. 535, 213 N. Y. 633, 107 N. E. 1087; *Smith Con. Co. v. New York*, 167 N. Y. App. Div. 253.

² *Taylor v. New Castle County*, 17 Del. 555, 43 Atl. 613; *Davis v. State*, 146 Ala. 120, 41 So. 681; *Jones v. New York*, 32 Misc. 221, 60 N. Y. App. Div. 161.

³ *Wakefield Con. Co. v. N. Y.*, *supra*; *Smith Con. Co. v. N. Y.*, *supra*.

⁴ *King v. U. S.*, 37 Ct. Cl. 428.

⁵ *Indianapolis v. Bly*, 39 Ind. 373; *Henderson Bridge Co v. O'Connor*, 88 Ky. 303, 11 S. W. 18; *Gallo v. N. Y.*, 15 N. Y. App. Div. 61.

⁶ *Satterlee v. U. S.*, 30 Ct. Cl. 31.

⁷ *Badger Mfg. Co. v. U. S.*, 49 Ct. Cl. 538.

§ 245. **Grounds for Rescission.**

Where one party sees fit to rescind or abandon a contract he must base such action on sufficient grounds.¹ Where a contract contains stipulations which permit a public body to abrogate it in certain specified cases but do not confer arbitrary power to annul it, the public body may not terminate it upon the theory that the contractor was not a proper person to perform the work.² Mistake is of course an appropriate ground for rescission in equity³ but it must be such a mistake as relates to material matters and not merely be the assumption of a bad bargain.⁴ When a contract has been executed and is rescinded for mistake the one who has performed is entitled to recover the fair and reasonable value of the services rendered or of materials and supplies furnished under it,⁵ or he may recover back the money paid or the property delivered under it.⁶ Even though the contract is not completed there may be rescission for a unilateral mistake in the offer or proposal and in the preliminary negotiations so far as they have proceeded.⁷ So also misrepresentations or fraud, when they affect a material term of the contract, furnish good ground for rescission to the innocent party.⁸ One induced by fraud to enter into a contract relying upon such inducement may rescind the contract.⁹ He may, however, if he chooses,

¹ *Becker v. Philadelphia*, 16 Atl. 625, 5 Pa. C. C. 97.

² *Purcell Envelope Co. v. U. S.*, 47 Ct. Cl. 1, s. c. 249 U. S. 313, 63 L. Ed. 260.

³ *Indianapolis Bd. v. Bender*, 36 Ind. App. 164, 72 N. E. 154; *Gibbs v. Gerardsville Sch. Dist.*, 195 Pa. St. 396, 46 Atl. 91; *Long v. Athol*, 196 Mass. 497, 82 N. E. 665; *Clarke Con. Co. v. N. Y.*, 229 N. Y. 413, 128 N. E. 241.

⁴ *Southington v. Southington W. Co.*, 80 Conn. 646, 69 Atl. 1023.

⁵ *Long v. Athol*, 196 Mass. 197, 82 N. E. 665.

⁶ *Griffith v. Sebastian County*, 49 Ark. 24, 3 S. W. 886.

⁷ *Harper v. Newburg*, 159 N. Y. App. Div. 695.

⁸ *Hingston v. L. P. & J. A. Smith Co.*, 114 Fed. 294; *Ricker v. Chicago San. Dist.* 91 Fed. 833.

⁹ *Crocker v. U. S.*, 240 U. S. 74, 60 L. Ed. 533, aff'g 49 Ct. Cl. 85.

on discovering the fraud, affirm the contract and sue for damages, or he may seek rescission by a repudiation of the contract, tendering back what he has received under it and he may then recover what he has parted with or its equivalent value.¹ Mere inadequacy of consideration, however, is not regarded even in equity as a sufficient ground for rescission.²

§ 246. What Default Authorizes Rescission.

Where a default in performance is partial and is such as may be compensated in damages, the contract is not ended.³ A slight or casual breach will not justify rescission. The breach must be substantial and go to the very foundation of the contract and be such as to defeat its very objects before it will justify rescission.⁴ Where the contract specifies the time within which it must be completed and it is not performed within the time limited, or within a reasonable time, if there be no specific provision, such failure to complete will warrant a rescission of the contract.⁵ So also a failure to properly perform the contract, if not contributed to by the public body will justify the latter in terminating the contract.⁶ Where wrongful acts of the public body or its officers bring about the default, of course, the right of rescission does not exist.⁷

¹ *New London City Bd. v. Robbins*, 82 Conn. 623, 74 Atl. 938.

² *Quigley v. Sumner County Commr's*, 24 Kan. 293; *Stewart v. State*, 2 Harr. & G. (Md.) 114.

³ *Roettinger v. U. S.*, 26 Ct. Cl. 391; *Amsterdam v. Sullivan*, 11 App. Div. 472, 162 N. Y. 594, 57 N. E. 1123.

⁴ *Lewman v. U. S.*, 41 Ct. Cl. 470.

⁵ *Weeks v. U. S.*, 45 Ct. Cl. 409; *Clark v. U. S.*, 3 Ct. Cl. 451.

⁶ *National Contr. Co. v. Comm*, 183 Mass. 89, 66 N. E. 639; *Richman v. New York*, 89 Misc. 213; *Portland v. Baker*, 8 Oregon, 356; *Milliken v. Callahan Co.*, 69 Tex. 205, 6 S. W. 681; *Watson v. DeWitt Co.*, 19 Tex. C. A. 150, 46 S. W. 1061; *Amsterdam v. Sullivan*, *supra*.

⁷ *King v. U. S.*, 37 Ct. Cl. 428; *Roberts v. Bury Imp. Comm'rs.*, L. R. 5 C. P. 310.

And in like manner the contractor may not himself terminate or abandon the contract except there be some wrongful act or default by the public body.¹ He, however, has the right of rescission if the public body fails or refuses to fulfill its own contract obligations and to perform those acts which it is their duty to perform and which are conditions precedent to performance by the contractor or which prevent him from proceeding with performance.² If the public body defaults in furnishing necessary material which it is bound to furnish under the contract, the contractor is justified in treating the contract as terminated.³ Where, accordingly, a contractor breaches his contract with a city for the reduction of garbage by refusing to receive further garbage, the liability of the contractor and his sureties accrues at once, since such refusal under a contract which required him to take all the garbage was the breach of a *dependent* covenant which entitled the public body to treat the entire contract as broken and to recover immediately the damages for a total breach.⁴

If the public body fails to furnish the necessary dumps under a garbage contract, which from its terms was entire, this gives the contractor the right to terminate and rescind the entire contract.⁵ Where a contract to excavate a portion of a drainage canal provides for forfeiture in case the contractor becomes in default in the progress of the work, such provision will be enforced since the inconvenience to

¹ Chicago San. Dist. v. Ricker, 91 Fed. 833; Lynip v. Alturas Sch. Dist., 24 Cal. App. 426, 141 Pac. 835; Becker v. Philadelphia, 5 Pa. C. C. 97, 16 Atl. 625.

² Clark v. N. Y., 3 Barb. 288; Jungdorf v. Little Rice, 156 Wis. 466, 145 N. W. 1092.

³ McConnell v. Corona City W. Co., 149 Cal. 60, 85 Pac. 929, 8 L. R. A. n. s. 1171; Clarke Cont. Co. v. New York, 229 N. Y. 413, 128 N. E. 241; Mahon v. Columbus, 58 Miss. 310, 38 Am. Rep. 327.

⁴ Bridgeport v. Ætna Indem. Co., 91 Conn. 197, 99 Atl. 566.

⁵ Clarke Con. Co. v. City, *supra*.

the public from the failure to complete cannot be measured in money loss.¹

§ 247. Waiver of Right to Rescission.

The right to rescission may be waived by the party who is entitled to it by his failure to avail himself promptly of such right² or by words or conduct which show an intention not to exercise it. Such party cannot stand by and permit the adverse party to change his position or give up substantial rights upon the theory that the contract is still in force and then afterwards claim the contract is terminated. So he may not bring an action to enforce the contract after knowledge of his right to rescission, for this is an affirmance of the contract which will bar later rescission.³ In like manner acts which indicate a ratification of a voidable contract will prevent a later rescission.⁴

Even the reserved right under a contract to annul it may be waived.⁵ Where the public body accepts work in an incomplete condition and uses it, the right to rescind the contract for failure to complete the work is thereby waived.⁶ Where the right to supervise and inspect the work as it progresses is given by contract to the public body, with the power to approve or reject the material or work, after the building has been completed and the public body has the use of it, it cannot rescind the contract and refuse to pay the compensation on the ground of defects in the material or workmanship which was approved, as the work was done by its representative.⁷ And after the

¹ *Harley v. San. Dist.*, 226 Ill. 213, 80 N. E. 771.

² *Bader v. New York*, 51 Misc. 358.

³ *People v. Stephens*, 71 N. Y. 527.

⁴ *Ferrari v. Escambia County*, 24 Fla. 390, 5 So. 1.

⁵ *Taylor v. New York*, 83 N. Y. 625.

⁶ *Packwaukee v. Amer. B. Co.*, 183 Fed. 359; *Florence Gas, etc., Co. v. Hanby*, 101 Ala. 15, 13 So. 343.

⁷ *Packwaukee v. Amer. B. Co.*, 183 Fed. 359.

ground for termination exists if the public body fails to terminate it expressly but on the other hand acquiesces in the continuance of the work it waives the right to rescind.¹ The waiver of time limit fixed by the contract is a waiver of the right of forfeiture, but the public body may grant or refuse to grant an extension of time, irrespective of damages resulting therefrom.² The right of a contractor who agreed to dress building stone delivered to him by the other party to the contract, to rescind it on account of delay in the delivery of the stone was lost, where he failed to act promptly, but on the contrary received and dressed a large quantity of the stone after shipments had been resumed.³ If a contractor fails to proceed with the speed required to finish the work within the time limited under the contract and the public body acquiesces in the continuance of the work thereafter, there is a waiver of the right to terminate the contract.⁴

§ 248. Restoring Status Quo.

When the parties cannot be placed in statu quo the contract will be rescinded in equity only where the clearest equities demand it.⁵ Both at law and in equity the general rule is that the party who rescinds a contract must place the other party in status quo ante.⁶ Where accordingly one party has received and retained the benefits of substantial partial performance of the contract by the other party who has failed to completely fulfill his covenants, the first party cannot retain the benefit and repudiate the

¹ *Rosser v. U. S.*, 46 Ct. Cl. 192; *Carland v. New Orleans*, 13 La. Ann. 43.

² *Rosser v. U. S.*, *supra*.

³ *Graham v. U. S.*, 188 Fed. 651, *aff'd* 231 U. S. 474, 58 L. Ed. 319.

⁴ *Foster v. Worthington*, 58 Vt. 65, 4 Atl. 565.

⁵ *U. S. v. Norris*, 222 Fed. 14; *Harper v. Newburgh*, 159 N. Y. App. Div. 695.

⁶ *Chance v. Bd. of Comm'rs Clay County*, 5 Blackf. 441, 35 Am. Dec. 131.

burdens, but is bound to perform his part, and his remedy for the breach is limited to compensation in damages.¹ But the rule that neither party to a transaction will be allowed to take advantage of its invalidity while retaining the benefits applies only to voidable contracts and not to a transaction which is absolutely void.² And it is the general rule that one seeking to rescind for mistake or fraud must restore the status quo and rescission can only be had where the status quo can be restored. But there are some exceptions to this rule, in so far as it applies to mistake³ and, apparently against the current of authority, there are some exceptions likewise in the case of fraud,⁴ under which it is determined the party suing to rescind a fraudulent contract need not offer to return what has been received under the contract.⁵ But the prevailing rule is otherwise,⁶ for a man does not become an outlaw because he has committed a fraud and while he may not be able to take advantage of his own fraud and use it as a ground to rescind the contract, where the other who has the right does rescind, the courts endeavor to do substantial justice by requiring him to do what equitably he should and restore or offer to restore what has been received under the contract as a condition of rescission.

A public body is, however, sufficiently restored to status quo upon a cancellation of the contract because it induced a contractor by mutual mistake as to the amount of work

¹ *Idem.*

² *Independent Schl. Dist. v. Collins*, 15 Idaho, 535, 98 Pac. 857, 128 Am. St. R. 76; *Bartlett v. Lowell*, 201 Mass. 151, 87 N. E. 195.

³ *U. S. v. Morris*, *supra*; *Harper v. Newburgh*, *supra*.

⁴ *Continental Securities Co. v. Belmont*, 150 N. Y. App. Div. 298, 206 N. Y. 7, 99 N. E. 138, 51 L. R. A. n. s. 112.

⁵ *Idem.*

⁶ *Stotts v. Fairfield*, 163 Iowa, 726, 145 N. W. 61; *Northampton v. Smith* 11 Metc. 390.

to be done, to enter into the contract, where it is required to pay merely the value of work then done.¹

§ 249. Effect of Rescission.

Rescission wholly terminates a contract² and no suit thereafter may be maintained to enforce it or for damages for the breach of the contract since it is ended.³ Sometimes in the giving of notice to rescind terms are used, the effect of which would be to put an end to the contract and all rights under it, when such is very far from the real intention of the party electing to rescind and who uses such language to give expression to his purpose. But the mere use of words such as "rescind" and "cancel" which literally and strictly construed would effect a complete end and destruction of the contract will not control the courts where the real intention of the party rescinding is to be released from further obligation to comply with the terms because of the default of the other party, and to hold such party to the payment of damages. Courts will consider not only the language, but all the circumstances including the effect of a complete rescission, and as to whether the innocent party intended such a result in reaching a conclusion as to the proper construction of such language; and words will not be permitted to prevail over intent.⁴ Such words as "cancel" or "annul," if ill chosen, will be taken to mean a refusal to perform further because of the default of the other party and not to rescind or avoid.⁵ If their real effect was given to them, as used in the notice of refusal to be obligated by its terms because of the other

¹ *Long v. Athol*, 196 Mass. 497, 82 N. E. 665.

² *Hayes v. Nashville*, 80 Fed. 641.

³ *East St. Louis G. Co. v. E. St. Louis*, 57 Ill. App. 411; *Newport v. Phillips*, 19 Ky. L. R. 352, 40 S. W. 378.

⁴ *Hayes v. Nashville*, *supra*.

⁵ *U. S. v. O'Brien*, 220 U. S. 321, 55 L. Ed. 481, aff'g 163 Fed. 1022.

party's default and the contract was made naught, all rights under the contract would be ended, whereas the contract provides in terms that rights shall arise on annulment, which, but for this provision in the contract the public body annulling would not have.¹ A contract may be abandoned but kept alive as an enforceable obligation to which the party abandoning may still look for the purpose of determining the compensation he may be entitled to by virtue of its terms for the very breach which gave him such right of abandonment.²

The implied obligation to restore the status quo survives rescission and may be enforced after rescission has occurred.³ So also as to the right to receive payment of money due pursuant to the terms of a contract which was earned prior to its disaffirmance.⁴ The agreement to terminate a contract does not imply a surrender of all claims for its breach up to that time.⁵ When a contract is rescinded and the work or supplies are used by the public body and it receives the benefits of these, it is liable on quantum meruit.⁶ Where a contract is avoided for fraud and the public body retains the supplies furnished under the contract a recovery of their value may be had.⁷ Where the public body continues to receive the benefits of the contract, even after rescission, it becomes liable on implied contract to pay for the same.⁸

A public body may abandon or terminate a contract and

¹ *U. S. v. O'Brien, supra.*

² *Hayes v. Nashville, supra.*

³ *Crocker v. U. S.*, 240 U. S. 74.

⁴ *People v. Republic Sav. L. Ass'n*, 97 N. Y. App. Div. 31.

⁵ *U. S. v. O'Brien, supra*; *Hayes v. Nashville, supra.*

⁶ *Greenlee County v. Cotey*, 17 Ariz. 542, 155 Pac. 302; *Watson v. DeWitt County*, 19 Tex. Civ. App. 150, 46 S. W. 1061; *Crocker v. U. S.* 240 U. S., 74, 60 L. Ed. 533, aff'g 49 Ct. Cl. 85; *Long v. Athol*, 196 Mass. 497, 82 N. E. 665.

⁷ *Crocker v. U. S.*, *supra.*

⁸ *State v. Great Falls*, 19 Mont. 518, 49 Pac. 15; *U. S. Water Works v. Du-Bois*, 176 Pa. St. 439, 35 Atl. 251. See *Roettinger v. U. S.*, 26 Ct. Cl. 391.

prevent the further performance of it by the contractor, upon the usual terms which the law imposes in such cases, namely: the recovery of compensatory damages,¹ if any have arisen. In case it turns out that the public body have wrongfully prevented the contractor from performing, it is liable in damages for breach of contract.² Where a contractor voluntarily substitutes one contract for another he relinquishes any damage incurred under the old contract.³

A contractor has no action for damages by reason of the exercise by the public body of its reserved right to annul the contract when not satisfied with the work.⁴ While as stated above, rescission ends a contract and all rights under it, an attempted rescission which proves ineffective does not impair such right of action.⁵

Where a contract provides that out of installment payments a certain amount shall be retained until the contract is completed and for the forfeiture of such amount, in case of annulment of the contract for the contractor's failure to duly and properly perform, the right to retain such money must be clearly shown and brought within the terms of the contract, as forfeitures are not encouraged.⁶ Nevertheless such provisions are valid, and when the forfeiture comes clearly within the terms of the contract the provision of the contract will be upheld and enforced.⁷

¹ *Damon v. Granby*, 2 Pick. 345; *Lord v. Thomas*, 64 N. Y. 107; *Parr v. Greenbush*, 112 N. Y. 246, 19 N. E. 684.

² *Wakefield Cons. Co. v. N. Y.*, 157 N. Y. App. Div. 535, 213 N. Y. 633, 107 N. E. 1087; *Smith Cont. Co. v. N. Y.*, 167 N. Y. App. Div. 253; *Amsterdam v. Sullivan*, 11 N. Y. App. Div. 472, 162 N. Y. 594, 57 N. E. 1123; *Wells v. West Bay Bd. of Educ.*, 78 Mich. 260, 44 N. W. 267.

³ *Braden v. U. S.*, 16 Ct. Cl. 389.

⁴ *Harder v. Marion County*, 97 Ind. 455.

⁵ *Greenville v. Greenville W. Wks. Co.*, 125 Ala. 625, 27 So. 764. See *Nat. Cont. Co. v. Hudson R. P. Co.*, 192 N. Y. 209, 84 N. E. 965.

⁶ *Harley v. Chicago San. Dist.*, 226 Ill. 213, 80 N. E. 771; *Bietry v. New Orleans*, 22 La. Ann. 149; *Henegan v. U. S.*, 17 Ct. Cl. 273.

⁷ *Harley v. Chicago San. Dist.*, *supra*; *Williams v. U. S.*, 28 Ct. Cl. 518.

PART V. PERFORMANCE AND BREACH

CHAPTER XXXVIII

PERFORMANCE—TO SATISFACTION OF ADVERSE PARTY OR THIRD PERSON

§ 250. Performance to Satisfaction of Other Party or Engineer.

In most public contracts it is provided that the contractor shall complete the entire work in a thoroughly skillful and workmanlike manner, and satisfactory to the public body and their engineer. By reserving to the public body a general direction and superintendence the contractor agrees to conform to its reasonable directions, acting with an honest and just regard to its interest. But the public body and its engineer may not act arbitrarily or capriciously but must act reasonably and in accordance with fairness and good faith,¹ and where the public body ought in reason to be satisfied with the work, the courts will say that it is satisfied with it.² In some jurisdictions the rule is announced that where the work or materials are to be furnished to the satisfaction of a third party designated as arbiter, it is not a question of the good faith of the dissatisfaction claimed but the party hurt must show that the expression of dissatisfaction was the result

¹ *Chapman v. Lowell*, 58 Mass. 378; *Gearty v. Mayor*, 171 N. Y. 61, 63 N. E. 804; *Sidney School Furn. Co. v. Warsaw Sch. Dist.*, 130 Pa. St. 76, 18 Atl. 604; *Parlin & Orendorff Co. v. Greenville*, 127 Fed. 55; *G. A. Webb Co. v. Trustees Morgantown Sch.*, 143 N. C. 299, 55 S. E. 719.

² *Brooklyn v. Brooklyn Cty. R. Co.*, 47 N. Y. 475; *Gearty v. Mayor*, 171 N. Y. 61, 63 N. E. 804.

of fraudulent collusion between the arbiter and the public body.¹ And again it is declared that, where appliances or apparatus are purchased, and installed upon the understanding that they are not to be accepted unless they operate satisfactorily in the judgment of the public body upon tests, the latter is not obliged to accept and pay for them unless they are satisfactory when tested. In such cases the question of reasonableness or the good faith of the public body is not in concern.² When work is to be performed to the satisfaction of an engineer who is named as arbiter and he announces his decision, it becomes binding upon the public body.³ There are two general classifications which may be made of contracts to be performed to the satisfaction of a public body. The first is where it absolutely reserves to itself the right of decision without being required to disclose the reasons thereof, and the right to examine into the decision by the other party or by the courts is excluded. Since this is a competent matter for parties to insert in a contract, when it exists it becomes the law of the contract and binds the parties.⁴ The other classification is where the public body is held to have undertaken to act reasonably and fairly and to decide the question of satisfaction upon reasonable, just and sensible grounds. The decision in this latter class is open to judicial revision, and where the public body ought reasonably to be satisfied it will be held to be satisfied.⁵ When a garbage furnace meets the test provided and complies with the specifications, a public body cannot defeat the con-

¹ Hostetter v. Pittsburgh, 107 Pa. St. 419.

² U. S. Elec. F. Alarm Co. v. Big Rapids, 78 Mich. 67, 43 N. W. 1030; Manning v. Sch. Dis. Ft. Atkinson, 124 Wis. 84, 102 N. W. 356.

³ Omaha v. Hammond, 94 U. S. 98, 24 L. Ed. 70.

⁴ Parlin & Orendorff Co. v. Greenville, *supra*; U. S. Elec. F. Alarm Co. v. Big Rapids, *supra*; Manning v. Sch. Dis. Ft. Atkinson, *supra*.

⁵ Parlin & Orendorff Co. v. Greenville, *supra*.

tractor's recovery by capriciously and unreasonably refusing to express their satisfaction with the work.¹

§ 251. Decision of Engineer—Duty of Engineer.

Wherever parties agree upon some designated person whose judgment is to determine questions arising under a public contract and they confide to his judgment, skill and decision the determination as to the character, amount and value of work to be done, and as to its completion, they must abide by the judgment and decision of this tribunal of their own selection or impeach it on recognized grounds. But the very extent of his power and the conclusive character of his decision implies the corresponding duty that his adjudication shall be made not capriciously or fraudulently but reasonably and with due regard to the rights of both contracting parties.² He must not be affected by outside influence or suggestion.³ But in reaching this personal determination he may rely upon information obtained from other persons, where the contract does not require him personally to see that the work is done or the materials used.⁴ He must act honestly and in good faith. He may not act whimsically or arbitrarily.⁵ Who the designated person shall be is in the keeping of the parties and there is no objection to the parties choosing, from among suitable persons upon whose judgment and certified estimates payments shall be made, one who happens to be a public officer, since when acting as arbiter he acts individually.⁶

¹ *Idem.*

² *Ripley v. U. S.*, 223 U. S. 695, 56 L. Ed. 614; *Baltimore v. Ault*, 126 Md. 402, 94 Atl. 1044.

³ *Baltimore v. Ault*, *supra*.

⁴ *State v. Blanchard Cons. Co.*, 91 Kan. 74, 136 Pac. 905; *Jones v. New York*, 60 N. Y. App. Div. 161, 174 N. Y. 517.

⁵ *Baltimore v. Ault*, *supra*; *Evans v. Middlesex County*, 209 Mass. 474, 95 N. E. 897; *Lewman v. U. S.*, 41 Ct. Cl. 470.

⁶ *State v. Blanchard Cons. Co.*, *supra*.

§ 252. Validity of Stipulation Requiring Certificate of Engineer.

A contractor may lawfully consent that provision be inserted in his contract for public work that material or work shall not be paid for until approved by some officer, engineer or architect. Stipulations providing for such a person as arbiter, to decide all disputes arising during performance of the work, or to issue progress certificates showing his approval of the performance of the work, and of its final completion, are valid and binding.¹ So long as the person nominated acts in good faith and not arbitrarily and there is no fraud or palpable error in his decisions or certificates they are conclusive.² The powers conferred by these stipulations are, however, in derogation of the common-law right of trial by jury and should not be unduly extended. Parties are not permitted to oust the courts of jurisdiction by the scope and extent of the stipulation.³ But, when general language confers upon the engineers power to determine all the questions that may arise under the contract, which might prove objectionable, it will be limited by the more specific language which refers to them the decision as to the amount or the quantity of the work which is to be paid for, and all questions relative to the fulfillment of the contract by the contractor.⁴ Where the power conferred limits the decision of the engineer to disagreements or differences arising as to the true meaning of the drawings or specifications, the engineer has no power to determine a claim of the public body resulting from the

¹ *Ruch v. York City*, 233 Pa. St. 36, 81 Atl. 891; *Clark & Sons Co. v. Pittsburgh*, 217 Pa. St. 46, 66 Atl. 154.

² *Ruch v. York City*, *supra*.

³ *Seward v. Rochester*, 109 N. Y. 164, 168, 16 N. E. 348; *Ruch v. York City*, 233 Pa. St. 36, 81 Atl. 891; *Fulton County v. Gibson*, 158 Ind. 471, 63 N. E. 982.

⁴ *Nat. Cont. Co. v. Hudson River W. P. Co.*, 170 N. Y. 439, 63 N. E. 450.

contractor's delay.¹ The provision that such certificates must be obtained before suit and as a condition of suit will not invalidate such stipulations.²

§ 253. Powers of—Certificate of Engineer not Extended Beyond Submission.

The provisions of public contracts requiring submission of disputes to an arbiter appointed thereby is in derogation of the right to trial by jury, which will not be taken away from litigants by implication. In order to oust the jurisdiction of the courts it must clearly appear that the subject-matter was within the intended submission.³ An agreement of submission will not be extended by implication beyond its plain words; and a provision therein to submit questions that may arise as to fulfillment of a contract will not give the right to pass on a claim for damages for non-fulfillment.⁴ While such a submission may include the power to determine the right of a party to liquidated damages under the contract, this power will not be implied.⁵ Accordingly, any decision of the engineer as to matters not properly submissible to him under a contract will not be binding upon the parties.⁶

§ 254. Approval of Engineer—Power to Modify or Alter Terms of Contract.

An engineer or architect is merely the special agent of the public body appointing him, and unless expressly

¹ *Chandley v. Cambridge Springs*, 200 Pa. St. 230, 49 Atl. 772.

² *Nat. Cont. Co. v. Hudson River W. P. Co.*, *supra*; *Bray v. U. S.*, 46 Ct. Cl. 132.

³ *Ruch v. York City*, 233 Pa. St. 36, 81 Atl. 891; *Ætna Indem. Co. v. Waters*, 110 Md. 673, 73 Atl. 712.

⁴ *Ruch v. York City*, *supra*; *Somerset Borough v. Ott*, 207 Pa. St. 539, 56 Atl. 1079.

⁵ *Ruch v. York City*, *supra*.

⁶ *Idem*.

authorized to do so by the terms of the contract possesses no power to alter, change or modify the contract between the parties. If he does and issues a certificate after such change, stating that the work has been completed according to the contract, it will not bind the parties.¹

Where a public contract provides that the work shall proceed under the direction of a certain officer, engineer or architect, this will not authorize material or essential changes or modifications of the terms of the contract.² This power is limited to such changes as are contemplated by the parties at the time the contract was made and he cannot increase or diminish the quantities of work to be done beyond this limit or substantially or radically alter the character of the work without paying the reasonable value of changes directed.³ Where an engineer is empowered to make changes in details of a contract by which a given result is to be accomplished, he has no power to make changes which alter or destroy the essential identity of the thing to be effected.⁴ The engineers in charge of a reservoir dam construction cannot change the specifications of the work by increasing it in particulars by one hundred fifty-five per cent to five hundred per cent without an abrogation of the original contract to the extent of such changes.⁵

¹ *Williams v. Bd. of Carden Bottom L. Dist.*, 100 Ark. 166, 139 S. W. 1136.

² *Becker v. New York*, 176 N. Y. 441, 68 N. E. 855; *Bonesteel v. Mayor*, 22 N. Y. 162; *McMaster v. State*, 108 N. Y. 542, 15 N. E. 417; *Bond v. Newark*, 19 N. J. Eq. 376; *Ruch v. York City*, 233 Pa. St. 36, 81 Atl. 891; *Williams v. Bd. of Directors Carden B. L. Dist.*, 100 Ark. 166, 139 S. W. 1136.

³ *Hayden v. Astoria*, 74 Oreg. 525, 145 Pac. 1072; *National Cont. Co. v. Hudson Riv. P. Co.*, 192 N. Y. 209, 84 N. E. 965; *McMaster v. State*, *supra*; *Cook v. Harms*, 108 Ill. 151; *Smith v. Bd. of Educ.*, 76 W. Va. 239, 85 S. E. 513; *Salt Lake City v. Smith*, 104 Fed. 457; *Henderson Bridge Co. v. McGrath*, 134 U. S. 260, 33 L. Ed. 934.

⁴ *Nat. Cont. Co. v. Hudson Riv. W. P. Co.*, 192 N. Y. 209, 84 N. E. 965; *McMaster v. State*, *supra*; *Dunning v. Orange County*, 139 N. Y. App. Div. 249, 204 N. Y. 647, 97 N. E. 1104; *County of Cook v. Harms*, 108 Ill. 151, 159; *Salt Lake City v. Smith*, *supra*.

⁵ *Hayden v. Astoria*, *supra*.

And an architect has no power, to be exercised at his pleasure, to make such material alterations and changes in drawings as he might think proper.¹ If such power existed, drawings and specifications would be useless adjuncts to a contract.² But on the other hand, where the specifications refer to a building instead of buildings but actually refer to rear walls in the plural, a contractor will be required to underpin the walls of two buildings of which he knew by inspection, since this ambiguity gave rise to a dispute upon which the decision of the architect was final.³

§ 255. Decision of Engineer—Power to Require Doing of Work Apparently or Doubtfully Outside Terms of Contract.

Where an engineer or other officer or representative of a public body without collusion and against the contractor's opposition requires the latter to do something as covered by his contract, and the question whether this requirement is embraced within the contract is fairly debateable and its determination is surrounded by doubt, the contractor may comply with the demand under protest, and subsequently recover damages, even if it turns out that he was right and the thing required was not covered by the contract.⁴ On the other hand, if the thing required is clearly beyond the limits of the contract, the contractor may not even do it under protest and subsequently recover damages.⁵ In this latter case the reason for such rule is that the engineer

¹ *Smith v. Bd. of Education*, *supra*.

² *Idem*.

³ *Merrill-Ruekgaber Co. v. U. S.*, 49 Ct. Cl. 533, *aff'd* 241 U. S. 387, 60 L. Ed. 1058.

⁴ *Borough Const. Co. v. New York*, 200 N. Y. 149, 93 N. E. 480; *Beckwith v. New York*, 148 N. Y. App. Div. 658, 210 N. Y. 530, 103 N. E. 1121; *Gearty v. Mayor*, 171 N. Y. 61, 63 N. E. 804; *Lentilhon v. New York*, 102 N. Y. App. Div. 548, 185 N. Y. 549, 77 N. E. 1190.

⁵ *Borough Const. Co. v. New York*, *supra*; *Becker v. New York*, 176 N. Y. 441, 68 N. E. 855.

would be making a new contract for the parties which he is without power to do. This can be done only in the manner prescribed by statute.¹ In the latter case the contractor must refuse to proceed. In the former case he may refuse to proceed, stop work as ordered by the engineer, stand upon his contention that the work required to be done or to be done over again is either outside the contract or has been properly done already, as the case may be, and bring his action to recover for labor and materials performed and furnished under the contract and claim his prospective profits.² But in those cases where there is doubt that the thing required to be done is embraced within the contract the contractor is not compelled to refuse obedience to the order of the engineer and incur the hazard of becoming a defaulter upon his contract. He may do the work under protest and recover damages for the breach of his contract. The hazards of an incorrect decision cannot fairly be placed upon the contractor. But he must protest or the officer or engineer will have the right to assume that the contractor acquiesces in his decision and performs the work under the contract. He cannot apparently accept the decision to do the work, and afterwards attack the decision as incorrect and seek to recover for it.³ Where, however, the contractor makes his protest under the claim that the true construction of the contract does not require him to do the work he may recover for the work done,⁴ or for damages for breach of the contract.⁵

¹ *Becker v. New York*, *supra*.

² *Gearty v. Mayor*, *supra*; *Borough Const. Co. v. New York*, *supra*; *Beckwith v. New York*, *supra*; *Roehm v. Horst*, 178 U. S. 1, 44 L. Ed. 953, aff'g 91 Fed. 345.

³ *Bowe v. U. S.*, 42 Fed. 761, 778.

⁴ *Callahan Const. Co. v. U. S.*, 47 Ct. Cl. 229; *Federal Cont. Co. v. Coal Cr. D. & L. Dist.*, 166 Ill. App. 369; *U. S. v. Smith*, 256 U. S. 11, aff'g 54 Ct. Cl. 119.

⁵ *Borough Const. Co. v. New York*, *supra*; *Gearty v. Mayor*, *supra*.

§ 256. Effect of Failure of Engineer to Notify Contractor During Progress of Work that Work Does not Comply with Contract.

Where a contract appoints someone qualified to judge the work and its progress, and charges him with the duty of inspecting the work and reporting upon it and requires him to notify the contractor if any of the work or materials fail to comply with the plans and specifications and such person inspects the work and allows it to proceed and fails to notify the contractor during its progress that the work does not comply with the contract, this operates as an acceptance of the work and, in the absence of a provision in the contract saving the public body against such consequences, is conclusive. One appointed to accept or reject work must do so when the work is being done. He may not allow the contractor to believe that the work is satisfactory and when finished reject it.¹

§ 257. Certificate of Engineer—Certificate of Performance—Condition Precedent to Payment.

Where the contract provides that payment is not to be made until the officer appointed by the contract certifies that the work has been performed in accordance with the contract, the procuring of such certificate is a condition precedent to payment, and where such officer refuses to issue the certificate and there is no fraud, or such gross mistake as to imply fraud and no failure to exercise an honest judgment, no action will lie for the compensation provided by the contract.²

¹ *Danville Bridge Co. v. Pomroy*, 15 Pa. St. 151; *Pauly Jail Bldg. & Mfg. Co. v. Hemphill County*, 62 Fed. 698. See *Lamborn v. Marshall*, 133 Mich. 250, 95 N. W. 78. See § 261.

² *Kihlberg v. U. S.*, 97 U. S. 398, 24 L. Ed. 1106, aff'g 13 Ct. Cl. 148; *Sweeney v. U. S.*, 109 U. S. 618, 27 L. Ed. 1053, aff'g 15 Ct. Cl. 400; *Phelan v. Mayor*, 119 N. Y. 86, 23 N. E. 175; *O'Brien v. Mayor*, 139 N. Y. 543, 35 N. E. 323.

§ 258. Certificate of Engineer, Valuation of Extra Work, Condition Precedent to Payment.

It is sometimes provided in public contracts that the prices and quantities of extra work shall be agreed upon in addition to the provision that the order therefor shall be in writing. When a contract so provides in effect it requires a valuation of the extra work before payment therefor can be required, and the decision of the engineer upon this question is final and conclusive when given.¹

§ 259. Certificate of Engineer—Condition Precedent to Suit.

Where a final certificate of the proper performance of work is required by contract to be obtained from an engineer or architect, or disputes are referred to him by contract stipulation for his decision, these requirements are binding and constitute a condition precedent to the maintenance of any action to enforce payment from the public body.² The jurisdiction of the engineer is limited, however, by the terms of the contract and relates usually to disputes arising during the performance of the contract. Such stipulations will not be extended to cover questions arising after the completion of the contract. Nor will it be interpreted to deprive the parties of their rights to a judicial construction of the contract, involving matters of law, or relating to the question of the due compensation to which he was legally entitled under the contract or

¹ Kennedy v. U. S., 24 Ct. Cl. 122.

² Sweeney v. U. S., 109 U. S. 618, 27 L. Ed. 1053, aff'g 15 Ct. Cl. 400; Kihlberg v. U. S., 97 U. S., 398, 24 L. Ed. 1106, aff'g 13 Ct. Cl. 148; Barlow v. U. S., 35 Ct. Cl. 514, 184 U. S. 123, 46 L. Ed. 463; Amer. Bond. & T. Co. v. Gibsonl Co., 127 Fed. 671; Brown v. Baton Rouge, 109 La. 967, 34 So. 41; Nationa Cont. Co. v. Comm., 183 Mass. 89, 66 N. E. 639; Dinsmore v. Livingston County, 60 Mo. 241; Montgomery v. N. Y. 151 N. Y., 249, 45 N. E. 550; Dwyer v. Bd. of Educ., 27 App. Div. 87, 165 N. Y. 613, 59 N. E. 1122; Phelan v. Mayor, 119 N. Y. 86, 23 N. E. 175; Hostetter v. Pittsburg, 107 Pa. St. 419.

under evidence as to the acts of the parties not in terms covered by the contract.¹ Where the contract provision is for a final certificate and the public body acting under other provisions exercises its right to stop the work for delay and completes the work, if the contractor brings suit for a balance claimed to be due he is not obliged to obtain the certificate of the engineer as a condition precedent thereto.² Where the arbitration clause is of doubtful application it will not be extended to a dispute between the parties as to whether liquidated damages should be paid because a building was not completed on the date fixed in the contract.³ Agreements which provide for arbitration of matters arising during the course of the work and which cannot be left until the work is completed, must be upheld. Even though the terms of a contract are rigorous, if there is nothing to show that the engineer acted in bad faith, it must be presumed that he acted with appropriate regard to his duties between the parties.⁴ If the action is not upon the contract but for breach of it, as where the contractor is compelled to do work over which was properly done under the contract and sues for his damage, a certificate is not necessary.⁵

§ 260. Appeal from Decision of Engineer.

The duty to appeal to a chief engineer or other officer from the resident engineer or engineer in charge of work, where it exists, must be exercised. But such duty will not be unduly extended to cover matters which are not affected

¹ *Gammino v. Dedham*, 164 Fed. 593.

² *Clark & Sons Co. v. Pittsburgh*, 154 Fed. 464, 164 Fed. 441.

³ *Maurer v. Sch. Dist.*, 186 Mich. 223, 152 N. W. 999.

⁴ *Gearing v. U. S.*, 48 Ct. Cl. 12.

⁵ *Gearty v. Mayor*, 171 N. Y. 61, 63 N. E. 804; *Borough Cons. Co. v. New York*, 200 N. Y. 149, 93 N. E. 480; *Faber v. New York*, 222 N. Y. 255, 118 N. E. 609; *Contra*, *Amer. Bond Co. v. U. S.*, 127 Fed. 671.

by such provision of a contract.¹ The basic principle in all contract questions relating to the power of decision by an engineer is that he possesses no power and has no jurisdiction over matters not expressly committed to him by the contract.

§ 261. **Decision or Certificate of Engineer—Refusal to Make.**

When a contract makes it a condition precedent to a contractor's right to require payment that the work should be fully completed as set out in the contract, and such completion certified by a designated officer, if in contemplation of the contract it ought to be given, it is unreasonable to refuse it.² The engineer must issue the certificate when, in the contemplation of the contract the state of things exists, beyond dispute, to which he is to certify, namely, the due completion of the contract. A contractor is accordingly excused from obtaining the certificate when the refusal to issue it is unreasonable or it is in bad faith refused. The refusal to accept the work cannot be arbitrary, unreasonable or unjust if it ought to be accepted.³ The substantial performance of a contract entitles a contractor to recovery. So the question of reasonableness of a refusal to certify and approve work substantially performed is for a jury to decide.⁴ But the decision of the engineer when honestly made is binding. If he passes work and in good faith approves it expressly

¹ *Ripley v. U. S.*, 223 U. S. 695, 56 L. Ed. 614.

² *Ripley v. U. S.*, 223 U. S. 695, 56 L. Ed. 614; *Scully v. U. S.*, 197 Fed. 327; *Bowery Nat. Bk. v. Mayor*, 63 N. Y. 336; *MacKnight Flintic Stone Co. v. Mayor*, 160 N. Y. 72, 54 N. E. 661; *McGuire v. Rapid City*, 6 Dak. 346, 43 N. W. 706; *Schmidt v. North Yakima*, 12 Wash. 121, 40 Pac. 790; *Walsh Const. Co. v. Cleveland*, 271 Fed. 701, 711.

³ *Bowery Nat. Bk. v. Mayor*, *supra*; *MacKnight Flintic S. Co. v. Mayor*, *supra*; *Scully v. U. S.*, *supra*.

⁴ *Elizabeth v. Fitzgerald*, 114 Fed. 547.

or by implication during its progress, this decision is not open to his objection. He cannot reëxamine his own conclusions after the work is done and refuse a certificate. After he examines work day by day and approves of it, he may not thus lead a contractor into the belief that it is satisfactory and when the work is completed reject it.¹ The fact that an officer approves a quarry will not prevent his passing upon the quality of the stone from it when the contract so provides. While his decision upon the quality of stone is final when exercised, he cannot exercise it in advance or forestall his judgment or that of other competent officers who might be designated by the government, where the contract provision is appropriate to that end.² The general rule is, therefore, that where a certificate of completion is unreasonably or in bad faith refused the contractor may recover without it upon proof of performance and of such refusal.³ When the parties to a contract put a practical construction upon the contract to the effect that as to extra and additional work no certificate determining the amount or value thereof is required, this is a waiver of the contract provision requiring a certificate, and the contractor may recover notwithstanding the refusal to issue it.⁴

§ 262. Decision or Certificate of Engineer—Power to Change Decision Once Made.

The power to determine questions by the engineer is derived from the contract. It is not a continuing power.

¹ *Lamson v. Marshall*, 133 Mich. 250, 95 N. W. 78; *Willey v. Sch. Dist.*, 25 Mich. 419, 424; *Schliess v. Grand Rapids*, 131 Mich. 52, 90 N. W. 700; *Brady v. Mayor*, 132 N. Y. 415, 30 N. E. 757.

² *U. S. v. Barlow*, 184 U. S. 123, 133, 46 L. Ed. 463.

³ *Bowery Nat. Bk. v. Mayor*, *supra*; *Whiteman v. Mayor*, 21 Hun, 117, 121; *Ross v. New York*, 85 N. Y. App. Div. 611.

⁴ *Bradley v. MacDonald*, 218 N. Y. 351, 385, 395, 113 N. E. 340.

He may not, therefore, find work finished or satisfactory one day and so certify and revoke his certificate and find to the contrary later. When he once makes his finding and issues his certificate his power to determine that question is exhausted. His power ends with decision. He may not subsequently modify, revoke or annul that decision or make a new one on the same question.¹

§263. Certificates of Engineer—Conclusive in Absence of Mistake, Bad Faith, etc.

When parties to a contract make the production of a certificate from an architect, engineer or other officer that the work is completed according to contract, a condition precedent to payment, they are bound by this provision as much as any other term of the contract. It is not enough for a contractor to show that he has completed the work. His agreement is that someone else should decide this. He is therefore concluded by his agreement and cannot by bringing an action withdraw the decision of this question from the person designated, and refer it to a legal tribunal for determination.² It is usually provided that the decision or approval of this arbiter shall be final and conclusive when given. Such a term of the contract will be enforced by the courts as the law of the contract and the intention of the parties will be carried out. These stipulations are binding and conclusive upon the parties in the absence of fraud or such gross mistake as necessarily implies bad faith.³ Or, to put it in other language, the

¹ *St. Charles v. Stookey*, 154 Fed. 772, 780.

² *Smith v. Brady*, 17 N. Y. 173.

³ *Barlow v. U. S.*, 35 Ct. Cl. 514, 184 U. S. 123, 46 L. Ed. 463; *Bowers Hyd. D. Co. v. U. S.*, 41 Ct. Cl. 214, aff'd 211 U. S. 176, 53 L. Ed. 136; *U. S. v. Cooke*, 207 Fed. 682; *U. S. v. Hurley*, 182 Fed. 776; *Guild v. Andrews*, 137 Fed. 369; *Bray v. U. S.*, 46 Ct. Cl. 132; *Henegan v. U. S.*, 17 Ct. Cl. 273; *Lawrence v. New York*, 29 N. Y. App. Div. 298, 162 N. Y. 617; *Jones v. New*

certificate is ordinarily conclusive, in the absence of proof of corruption, or bad faith, or misconduct on the part of the person designated, or palpable mistake appearing on the face of the certificate.¹ A decision by the engineer as to the value of extra work, if this question is submissible to him under the contract, is conclusive.² So long as the engineer acts honestly and with reasonable efficiency his action is binding upon the parties. His decision made in good faith and not whimsically will be conclusive even though somewhat ignorantly or mistakenly made.³ And of course a certificate procured by collusion and conspiracy between the contractor and the architect will not bind the public body.⁴ In determining the question as to whether the action of the engineer is in bad faith and the result of failure to exercise an honest judgment, if an engineer commits gross mistakes, which an engineer of his experience and competence, acting honestly, would not be reasonably supposed to make, which are not reconcilable with mere negligence or errors of judgment, and which materially favored one party to the contract at the expense of the other, a strong implication of bad faith will arise, which unexplained will be considered conclusive.⁵

York, 32 Misc. 211, 60 N. Y. App. Div. 161, 174 N. Y. 517; *O'Brien v. Mayor*, 139 N. Y. 543, 35 N. E. 323; *Burke v. Mayor*, 7 N. Y. App. Div. 128; *Snyder v. N. Y.*, 74 N. Y. App. Div. 421; *City St. Improv. Co. v. Marysville*, 155 Cal. 419, 101 Pac. 308; *McGuire v. Rapid City*, 6 Dak. 346, 43 N. W. 706; *Beattie v. McMullen*, 82 Conn. 484, 74 Atl. 767; *Caldwell et al. v. Pierce*, 154 Ky. 328, 157 S. W. 692; *Hatfield Sch. Dist. v. Knight*, 112 Ark. 83, 164 S. W. 1137; *Malone v. Phila.*, 12 Phila., 270; *Willey v. Sch. Dist.*, 25 Mich. 419.

¹ *Everard v. Mayor*, 89 Hun, 425; *Sewer Comm'rs v. Sullivan*, 11 N. Y. App. Div. 472, 162 N. Y. 594, 57 N. E. 1123; *Malloy v. Briarcliff Manor*, 145 N. Y. App. Div. 483; *Uvalde Cont. Co. v. New York*, 160 N. Y. App. Div. 284; *Quinn v. Mayor*, 16 *Id.* 408.

² *Bd. of Educ. of Paola v. Shaw*, 15 Kan. 33; *Rens v. Grand Rapids*, 73 Mich. 237, 41 N. W. 263; *Swift v. New York*, 89 N. Y. 52.

³ *Evans v. Middlesex County*, 209 Mass. 474, 95 N. E. 897.

⁴ *School District v. Randall*, 5 Neb. 408.

⁵ *Guild v. Andrews*, 137 Fed. 369.

§ 264. The Same—Conclusiveness—Estoppel Clause.

In many public contracts a clause is inserted to the effect that the public body will not be precluded or estopped by any return or certificate made by the engineer or other public representative from at any time showing the true and correct amount and character of the work which shall have been done and materials which shall have been furnished by the contractor. After a certificate of the engineer has been given and the work has been accepted, the public body are bound by it as much as the contractor, in the absence of fraud or palpable mistake, and unless such be claimed, the public body cannot under such an estoppel clause question anything except the amount of work done. While it may show that the work accepted was not the work that was agreed to be done and that the materials put into it were different from those required by the contract, or were less in amount than the public body was apparently entitled to under the certificate, yet it is not free to show, in spite of the certificate, that the materials which were put into the work and accepted were not proper because of some defect in them, or in the way in which the work was done, if the materials furnished are of the general description and kind called for under the contract.¹

§ 265. The Same—When not Binding or Conclusive.

The estimate of an engineer is only binding and conclusive as an adjudication, upon the condition that it is made according to the terms of the submission. In order to prevent the courts from considering the question, it must clearly appear that the subject-matter of the con-

¹ *Brady v. Mayor*, 132 N. Y. 415, 30 N. E. 757; *O'Brien v. Mayor*, 139 N. Y. 543, 35 N. E. 323; *Quinn v. Mayor*, 16 N. Y. App. Div. 408; *Devlin v. New York*, 124 *Id.* 184.

troversy was within the prospective submission.¹ The engineer may not introduce new terms into the contract. He has no power to determine what he thinks the contract ought to be. If he attempts to exercise such power his estimates or decisions are not conclusive.² The general rule is that he cannot bind the parties as to matters outside the contract.³ His authority will not be extended to disputes arising under a subsequent independent verbal agreement relating to extra work.⁴ His power of decision will not cover questions of law, as for instance, the question of ultimate liability to pay⁵ or the amount of compensation due.⁶ The power to construe the contract itself will not be considered as granted to the architect or engineer by inference or implication, or anything short of a distinct waiver. The power to determine the meaning and construction of drawings and specifications will not submit to his decision the contract rights of the parties.⁷ So also questions of law as to the liability of a contractor to pay liquidated damages for failure to do certain work in time⁸ or damages for the non-fulfillment of the contract,⁹ are outside the scope of his power. Where a person designated to act as arbiter is an employee of the public body, a letter sent by him giving notice to repair certain

¹ *Dhrew v. Altoona*, 121 Pa. St. 041, 15 Atl. 636; *Ruch v. City of York*, 233 Pa. St. 36, 81 Atl. 891.

² *Dhrew v. Altoona*, *supra*.

³ *Ruch v. City of York*, *supra*; *Harlow v. Homestead*, 194 Pa. St. 57, 45 Atl. 87; *Dyer v. Middle Kittitas Irrig. Dist.*, 40 Wash. 238, 82 Pac. 301; *Clark & Sons Co. v. Pittsburgh*, 146 Fed. 441, 154 Fed. 464; *Gammino v. Dedham*, 164 Fed. 593.

⁴ *Douglass et al. v. Morrisville*, 84 Vt. 302, 79 Atl. 391.

⁵ *Idem*.

⁶ *Gammino v. Dedham*, *supra*.

⁷ *Ætna Indem. Co. v. Waters*, 110 Md. 673, 73 Atl. 712; *Baltimore v. Schaub Bros.*, 96 Md. 534, 54 Atl. 106; *Gammino v. Dedham*, *supra*.

⁸ *King Iron & B. Co. v. St. Louis*, 43 Fed. 768, 10 L. R. A. 826.

⁹ *Ruch v. City of York*, *supra*.

work, is not action as arbiter but as agent of the public body, and his decision is not binding.¹ And wherever under the contract, matters within the scope of his authority come up for decision, these are not conclusive when not the result of honest judgment, made in good faith and free from fraud, or mistake amounting to fraud.² Any decision which is not his judgment, but the mere expression of the views or the influence, whether intentionally or innocently exercised, of others, is outside the contract and without force.³

§ 266. The Same—Not Conclusive—When Based on Erroneous Construction of Contract.

Where an engineer under an erroneous construction of the contract and of the rights of the parties thereunder, deliberately excludes from his final certificate work actually done by the contractor, and required by the contract, his decision is not final and binding upon the contractor, but may be attacked for palpable error, and the latter has a right to recover notwithstanding the provisions of the contract in regard to the final certificate.⁴

§ 267. The Same—Conclusiveness—Where Contract Illegal.

If a contract turns out to be illegal after performance and certificates of performance have been issued under the contract, such certificates of performance and completion

¹ *St. Charles v. Stookey*, 154 Fed. 772.

² *Baltimore v. Ault*, 126 Md. 402, 94 Atl. 1044; *Evans v. Middlesex*, 209 Mass. 474, 95 N. E. 897; *Willey v. Frac. Sch. Dist.*, 25 Mich. 419; *McCormick v. St. Louis*, 166 Mo. 315, 65 S. W. 1038; *Burns v. New York*, 31 Misc. 315, 69 N. Y. App. Div. 214; *Penn. B. Co. v. Kershaw*, 226 Fed. 728.

³ *Baltimore v. Ault*, *supra*.

⁴ *Burke v. Mayor*, 7 N. Y. App. Div. 128; *Uvalde Cont. Co. v. New York*, 160 *Id.* 284; *Croton Falls Cons. Co. v. New York*, 168 *Id.* 261; *Malloy v. Briarcliff Manor*, 145 *Id.* 483; *Gearty v. Mayor*, 171 N. Y. 61, 63 N. E. 804.

are not conclusive evidence against the public body that the contractor is entitled to be paid. The certificate issued under a contract cannot have any greater validity than the contract itself of which it is a mere part.¹

§ 268. The Same—When Provision not Applicable.

Where the public body has an absolute right under the terms of a contract to oust the contractor from the work and it acts under this power, the arbitration clause of the contract cannot apply and its election to act under the ouster clause is a waiver of arbitration. In like manner the provision for a final certificate to be obtained, upon completion of the work, before a contractor is entitled to final payment does not apply where the public body takes over and completes the work. The obtaining of it is not, therefore, a condition precedent to suit by the contractor for any balance claimed to be due under the contract.² Where a contract required a contractor to obtain his final estimate from certain architects, and in case the architects were discharged to obtain it from the public board itself, and the architects were discharged several months before the contractor instituted his suit, and he made repeated demands before suit for payment from the public board, which were refused, the failure to produce the architects' final certificate or explain its absence becomes of no consequence.³

It is unnecessary to produce a certificate where a contractor is driven from the work which, up to the time it was stopped, was properly performed.⁴ Where a con-

¹ Hart *v.* New York, 201 N. Y. 45, 55, 94 N. E. 219.

² Jonathan Clark & Sons Co. *v.* Pittsburgh, 146 Fed. 441, 154 *Id.* 464.

³ Germain *v.* Union Sch. Dist., 158 Mich. 214, 122 N. W. 524.

⁴ Clark & Sons Co. *v.* Pittsburgh, *supra*; Kingsley *v.* Brooklyn, 78 N. Y. 200, 216; O'Corr & Rugg Co. *v.* Little Falls, 77 N. Y. App. Div. 592, 178 N. Y. 622.

tract provided for payment of material only after it was accepted by the supervising architect and the contractor puts it beyond the power of the vendor to furnish evidence of inspection or approval by an arbiter the production of the certificate is not obligatory.¹ If performance of an act required to be performed in connection with the execution of a contract is prevented by the other party, non-performance is excused.²

**§ 269. The Same—When Production not Required—
When Provision not Applicable.**

The provisions of the contract and specifications which make the engineer the arbiter with reference to the work done under the contract and which require his certificate for work so done before a contractor will be entitled to payment do not apply to actions for breach of the contract. In an action for a breach of warranty or for damage for false representations as to conditions at the site, such provisions will not apply as such an action is not for work done under the contract, but for damages for its breach.³ When a contractor is required to do work a second time which was already done in compliance with the contract, the action is in like manner for breach of the contract and the provision regarding a certificate has no application.⁴ So when he is required to do work, not called for by his contract but not clearly outside of it, and he performs it under protest and he sues for breach of the contract, not for extra work done under it, a certificate is unnecessary.⁵ Generally when the action is to recover

¹ U. S. v. Jack, 124 Mich. 210, 82 N. W. 1049.

² Kingsley v. Brooklyn, *supra*; U. S. v. Jack, *supra*.

³ Faber v. New York, 222 N. Y. 255, 118 N. E. 609.

⁴ Gearty v. Mayor, 171 N. Y. 61, 63 N. E. 804.

⁵ Borough Cons. Co. v. New York, 200 N. Y. 149, 93 N. E. 480.

damages for breach of the contract, the provision requiring a certificate has no application.¹ Usually it has no application where a public body gives notice that it will take charge of the work and complete the contract, and the contractor sues to recover a claimed balance.² In such case he is not required to produce the certificate. And the omission to procure a certificate as to the value of extra work cannot affect the right of recovery where the suit is not upon the contract but in assumpsit. Even if a contractor does not fully perform his special contract, he still may have resort to the courts upon the common counts.³

§ 270. The Same—Waiver.

These provisions of the contract providing for a certificate of completion which constitute a condition precedent to payment may be waived, since they are inserted for the benefit of the public body.⁴ Either party to a contract is at liberty to insist upon a strict performance of the contract terms, but he may likewise waive any of its provisions made for his benefit.⁵ This waiver may be either express or implied.⁶ A statutory duty to obtain such a certificate may not be waived.⁷ It is only contractual stipulations that may be so treated. The public body alone can

¹ Fontano & Robbins, 18 App. D. C. 402; Gearty *v.* Mayor, *supra*; Borough Cons. Co. *v.* New York, *supra*; Markey *v.* Milwaukee, 76 Wis. 349, 45 N. W. 28.

² Clark & Sons Co. *v.* Pittsburgh, 146 Fed. 441, 154 Fed. 464.

³ Bd. of Comm'rs Fulton County *v.* Gibson, 158 Ind. 471, 63 N. E. 982.

⁴ Bradley *v.* McDonald, 218 N. Y. 351, 113 N. E. 340; Bowery Nat. Bk. *v.* Mayor, 63 N. Y. 336; Bader *v.* New York, 51 Misc. 358; Clark & Sons Co. *v.* Pittsburgh, 146 Fed. 441, 154 Fed. 464; Clark *v.* Pope, 70 Ill. 128; Douglass *v.* Morrisville, 84 Vt. 302, 79 Atl. 391.

⁵ Bradley *v.* McDonald, *supra*.

⁶ Preston *v.* Syracuse, 92 Hun, 301, 158 N. Y. 356, 53 N. E. 39; Maurer *v.* Sch. Dist., 186 Mich. 223, 152 N. W. 999.

⁷ See O'Dea *v.* Mitchell, 144 Cal. 374, 77 Pac. 1020; Reid *v.* Clay, 134 Cal. 207, 66 Pac. 262.

waive a provision of this kind; it cannot be waived by the engineer.¹

§ 271. Acceptance of Work as Waiver of Certificate of Engineer.

In construction contracts where someone is appointed by the contract to supervise the work on behalf of the public body, the acceptance, by such appointee of the work of construction as it progresses, is ordinarily conclusive upon the public body.² But in determining this question recourse must be had to the extent of power conferred upon the engineer, and the terms of the contract. Where a contract provides that the contractor shall be responsible for the work as a whole until accepted by the public body, acceptance by the engineer will not bind or operate as a waiver of the condition which makes payment dependent upon the obtaining of a certificate.³ Where an engineer expressly consents to unauthorized performance and material deviations from specifications and accepts a different class of work than that provided, such acts will not bind the public body. Acceptance of the work and payment of the contractor after a test will not conclude the public body, when made in ignorance of facts, which, if known, would have precluded acceptance or at least justified refusal of acceptance. When subsequently discovered the public body has a right to recover the damages sustained by breach of the contract, as the acceptance during progress of the work did not effect an estoppel or constitute a waiver of more complete performance, and such action survives such acceptance and final payment.⁴

¹ *Malloy v. Briarcliff Manor*, 145 N. Y. App. Div. 483, 491.

² *U. S. v. Walsh*, 115 Fed. 697; *Lamson v. Marshall*, 133 Mich. 250, 95 N. W. 78.

³ *Sterling v. Hurd*, 44 Colo. 436, 98 Pac. 174.

⁴ *U. S. v. Walsh*, *supra*.

CHAPTER XXXIX

PERFORMANCE—PARTIAL PERFORMANCE

§ 272. Performance—Partial Performance—Entire Contract.

The complete performance of an entire public contract is usually a condition precedent to a contractor's right of recovery and to the maintenance of an action therefor.¹ A party to an entire contract who has partly performed it and subsequently abandons the further performance according to its stipulations, voluntarily and without fault on the part of the other party or his consent thereto, can recover nothing for such part performance.² Where a contract required rock to be excavated two feet below the line of the curbstone grade, and a contractor excavated only one foot, and instead of depositing rock in the street and in the river in continuation of the street as provided in the specifications, sold and disposed of it for his own benefit, this is a palpable and willful violation of the contract and non-performance in such important particulars as will prevent recovery.³ Where a contract calls for drawing of plans and superintending the erection of a court house, and the latter services are not rendered and no good excuse is given for not rendering them, no

¹ *Bonesteel v. Mayor*, 22 N. Y. 165; *Clark v. Bd. of Comm'rs of Osage County*, 62 Okla. 7, 161 Pac. 791; *MacFarland v. Barber A. P. Co.*, 29 App. D. C. 506.

² *Spalding County v. Chamberlin & Co.*, 130 Ga. 649, 61 S. E. 533; *Clark v. Bd. of Comm'rs Osage County*, 62 Okla. 7, 161 Pac. 791; *Douglas v. Lowell*, 194 Mass. 268, 80 N. E. 510.

³ *Bonesteel v. New York*, *supra*.

recovery is permitted, since the contract is entire.¹ When a contract is terminated by the public body against the will of the contractor, who is prevented from further performance, he is not confined to the contract price, but may bring his action for breach of the contract and recover as damages all that he may lose by way of profits, in not being allowed to fulfill the contract; or he may waive the contract and bring his action on the common counts and recover the actual value of the work done. In the latter case no recovery is allowed for prospective profits, but the actual value of the labor and materials is the rule of damage.² Of course any contractor who performs the part of an entire contract which is profitable to him and abandons the part which is unprofitable should have no aid in court. Willful abandonment of a contract without cause will never receive the protection of the courts. To grant protection would be to permit a man to profit by his own wrong. Some courts, in order to carry out equitable principles and prevent injustice, are prone to consider, in modern times, that the entirety is destroyed by part performance and raise an implied promise to pay for the benefits received. But this is a mild fiction. The better rule is, if the contract is in fact entire, that the law leave the loss where the contract places it.³

Where a contract has been partially performed and the contractor fails to complete the contract in accordance

¹ *Spalding County v. Chamberlin*, *supra*.

² *Devlin v. New York*, 63 N. Y. 8; *Clark v. Mayor*, 4 N. Y. 338; *Jones v. Judd*, 4 N. Y. 411; *Masterson v. Brooklyn*, 7 Hill, 61, 75; *Sauer v. Sch. Dist. McKees Rocks*, 243 Pa. St. 294, 90 Atl. 150; *Glidden St. Bk. v. Sch. Dist.*, 143 Wis. 617, 128 N. W. 285. But see *Carlin v. New York*, 132 N. Y. App. Div. 90.

³ *Dermott v. Jones* (*Ingle v. Jones*), 2 Wall. (U. S.), 1, 17 L. Ed. 762; *Davidson v. Gaskill*, 32 Okla. 40, 121 Pac. 649, 38 L. R. A. N. S. 692; *National Cont. Co. v. Comm.*, 183 Mass. 89, 66 N. E. 639.

with its terms, the measure of damage is the cost of completion.¹

Where the contract is still executory on the part of the injured party, his damage is the difference between the cost of completion and the contract price.²

§ 273. Acceptance of Benefits.

Even though the work done or the structure erected pursuant to a contract, is not done in accordance with its terms, if what has been done is accepted, it is fair and right that the public body receiving the benefits should pay what these are worth. In many instances public work is done under a special contract which does not conform to its terms either in point of time or in any other respect, yet if the party accepts the work as done the contractor may recover its value upon the common counts.³ This principle is also applied in cases where the contract cannot be rescinded, but from its nature the work performed must enure to the benefit of the other, and where it would be unjust for such party to retain the benefits without compensation. In these cases the contractor must deduct from his contract price such a sum as will enable the public body to complete the contract according to its terms, or if that is impossible or unreasonable such sum as will fully compensate for the imperfection or insufficiency in work or materials. The contractor must also deduct such additional or consequential damages

¹ *Boise City v. Nat. Surety Co.*, 30 Idaho, 455, 165 Pac. 131; *New York v. Second Ave. R. Co.*, 102 N. Y. 572, 7 N. E. 905; *Newton v. Devlin*, 134 Mass. 490.

² *Nat. Cont. Co. v. Hudson R. W. P. Co.*, 118 N. Y. App. Div. 665, reversed O. G. 192 N. Y. 209, 84 N. E. 965; *Smith v. Copiah County*, 239 Fed. 425, aff'd 239 Fed. 432; *Peirce v. Cornell*, 117 N. Y. App. Div. 66.

³ *Baltimore v. Kinlein*, 118 Md. 336, 84 Atl. 483; *Skowhegan Water Co. v. Skowhegan*, 102 Me. 323, 66 Atl. 714.

which his breach may have occasioned to the public body. The contractor must also deduct all payments made.¹ The same general principles will likewise apply where the work has proved impossible of performance through no fault of the public body.² The recovery allowed will be upon quantum meruit, but no recovery for loss of profits will be permitted.³

§ 274. Entire Contract—Willful Refusal to Perform.

A public contract for the complete construction of a building, structure or work is an entire contract, and the willful refusal by the contractor to complete the building entitles the public body to a return of the installments paid.⁴

§ 275. Breach by Both Parties.

Where both parties break the contract, and the breaches by the public body are a perfect or partial excuse for the contractor's failure, the latter's breaches are not a complete defense to his action to recover the value of labor performed and materials furnished. A party to a contract, whose failure to perform it has contributed to the failures of the other party to perform, cannot urge that the failures of the latter are an absolute defense to an action brought by him to recover for partial performance.⁵

¹ *Kelly v. Bradford*, 33 Vt. 35; *Skowhegan Water Co. v. Skowhegan*, 102 Me. 323, 66 Atl. 714; *Baltimore v. Kinlein*, 118 Md. 336, 84 Atl. 483; *Sherman v. Conner*, 88 Tex. 35, 29 S. W. 1053; *Sherman v. Conner*, 72 S. W. (Tex.) 238; *Lyman v. Lincoln*, 38 Neb. 794, 57 N. W. 531; *Manning v. Ft. Atkinson Sch. Dist.*, 124 Wis. 84, 102 S. W. 356. See *Roettinger v. U. S.*, 26 Ct. Cl. 391; *Ward v. Kropf*, 207 N. Y. 467, 101 N. E. 469.

² *Kinser v. State*, 125 N. Y. Supp. 46, 145 App. Div. 41, 204 N. Y. 381, 97 N. E. 871.

³ *Kinser v. State*, *supra*.

⁴ *Trenton v. Bennett*, 27 N. J. L. 513, 517, 72 Am. Dec. 373; *Tompkins v. Dudley*, 25 N. Y. 272, 82 Am. Dec. 349; *U. S. v. U. S. Fid. & G. Co.*, 236 U. S. 512, 525, 59 L. Ed. 696.

⁵ *Delafield v. Westfield*, 41 N. Y. App. Div. 24, 169 N. Y. 582, 62 N. E. 1095.

§ 276. Suspension of Work.

When a contractor is entitled to receive an installment payment under his contract and the public body refuses to make the payment and the contractor thereupon suspends the work and does not resume it until the installment is paid, the acceptance of payment of the principal of the installment is a waiver of the right to payment of interest, as damages for failure to make the deferred payment. If the failure to pay the money constitutes a breach of the contract, the contractor to protect himself in his damages must pursue one of two remedies: he must stop the work, repudiate the contract and recover the contract price for the work done, or he must continue the work and sue for the past due installment and recover interest thereon as his measure of damages for withholding payment.¹

§ 277. Measure of Recovery where Part of Work is Performed by Strangers.

If a contractor with a public body is engaged to excavate and remove certain earth and payment is provided for by a unit price for each yard of earth excavated, and some of the earth included in his contract is removed and carried away by a stranger to the contract, who was excavating on adjoining land, before the contractor entered upon the performance of the work, and neither party to the contract took any step to prevent such stranger from removing the earth, the contractor may not adopt the acts of the stranger as his own and recover for the material excavated by such stranger.²

§ 278. Illegal Contract.

Where a contract is illegal in part and, although there is

¹ *Mechanics' Bank v. New York*, 164 N. Y. App. Div. 128.

² *St. George Cont. Co. v. New York*, 205 N. Y. 121, 98 N. E. 387.

but one written agreement covering several undertakings, it may safely be said that such instrument sets forth several contracts, one relating to each undertaking, or else that it sets forth a contract covering several independent and separable subjects, in either event it may be held valid as to some and invalid as to other parts and recovery will be permitted upon the former.¹ Where chattels or supplies have been delivered under a void contract the contractor may recover them in replevin, where the public body refuses to pay for them because the contract is void.²

§ 279. Prevention of Performance Because of Invalidity of Contract after Partial Performance.

Where a public contract becomes invalid because of a failure to observe some requirement of law, and, after a partial performance, complete performance is prevented by law, a recovery may be had for benefits conferred by part performance, upon the principle of the maxim that no one shall be made rich by making another poor. The recovery, however, is not upon the basis of the contract, which is invalidated, but upon an implied agreement founded upon a moral obligation to account for the moneys or property received or the value of the work where the public body subsequently appropriates and utilizes the work. Under such circumstances the contractors acquire a right and the public body becomes subjected to a liability, by virtue of a new and quasi-contractual relation founded in justice.³

§ 280. Interference with Contractor during Performance—Remedy in Equity—Injunction.

If during performance of a contract public officials

¹ *Hart v. New York*, 201 N. Y. 45, 94 N. E. 219.

² *LaFrance Eng. Co. v. Syracuse*, 33 Misc. 516.

³ *Ward v. Kropf*, 207 N. Y. 467, 101 N. E. 469.

interfere with a contractor and interrupt the performance of his obligations, or violate or refuse to perform conditions precedent which must be performed by the public body and the contractor has no adequate remedy at law because the damages which he would be entitled to recover are not capable of any accurate determination, and would have to be ascertained upon a basis so uncertain as not to afford adequate redress or would not place him in the same position which he occupied at the time of the breach, an injunction will be granted to restrain such interference or refusal.¹ The law should prevent the commission of wrongs whenever a party presents a clear right and its violation. It is not enough to redress the wrong merely after it is committed. Whenever it is possible and equitable a party should be compelled to perform his just obligation, and the courts should interfere to prevent a violation of rights. Accordingly where a public body attempts to impose new and burdensome conditions upon the contractor and requires him to abandon the method of doing the work provided by the contract and his remedy at law would be inadequate, the interference will be enjoined.² Where a contract provides for the erection of certain structures at the joint expense of the contracting parties but directs that these structures shall not be erected until other work is furnished and until their erection is by vote of commissioners determined to be necessary, and it is impossible to ascertain the damages which would be suffered from a violation of the contract terms, an injunction will lie.³ An injunction against a breach of

¹ *Dailey v. New York*, 86 Misc. 86, 170 N. Y. App. Div. 267, 218 N. Y. 665, 113 N. E. 1053; *Erie R. R. Co. v. Buffalo*, 180 N. Y. 192, 73 N. E. 26; *Walla Walla v. Walla Walla W. Co.*, 172 U. S. 1, 43 L. Ed. 341, aff'g 60 Fed. 957.

² *Dailey v. New York*, *supra*.

³ *Erie R. R. Co. v. Buffalo*, *supra*.

contract is in a sense indirectly accomplishing specific performance, and while it is true that specific performance will usually not be granted and cannot be granted where compensation at law is obtainable, nevertheless, even if reasons exist for refusing that remedy, it is no objection to the grant of injunction where the equities justify it.

CHAPTER XL

SUBSTANTIAL PERFORMANCE

§ 281. Performance—Rule Affecting Substantial Performance.

Substantial performance of a contract by one party coupled with a retention of benefits by the other will authorize an action by the former to recover the contract price. In such a case recovery may be had on an averment by the contractor of full performance, though the proof falls short of showing it, and the remedy of the public body is by counterclaim for its damages or by an independent action before it is sued to recover such damages as it has sustained through the contractor's failure to completely fulfill his covenants.¹ This rule is founded in justice, for if one party has received the benefit of substantial performance by the other, without paying the price agreed upon and the latter cannot or does not return these benefits, it would be manifestly unjust to permit him to retain them without paying or doing as he promised. It is in order to avoid such an injustice that a contractor who has substantially performed is permitted to enforce specific performance of the covenants of the public body, or to recover damages for their breach upon an averment of performance without proof of complete fulfillment.² The

¹ Omaha Water Co. v. Omaha, 156 Fed. 922; St. Charles v. Stookey, 154 Fed. 772; Walsh Const. Co. v. Cleveland, 271 Fed. 701; Ætna Iron Works v. Kossuth County, 79 Iowa, 40, 44 N. W. 215; White v. Braddock Sch. Dist., 159 Pa. St. 201, 28 Atl. 136; Sch. Directors v. Roberson, 65 Ill. App. 298.

² St. Charles v. Stookey, *supra*; Newport v. Newport B. Co., 90 Ky. 193, 13 S. W. 720.

foregoing statement of principles is of course a modern modification of the common-law rule which required the express stipulations of the contract to be strictly performed and admitted of no recovery for substantial compliance. This rule, however, has been much relaxed and the modern tendency is not to require in all cases that the performance shall be literal and exact. The more equitable rule stated has been generally adopted which permits recovery by one who in good faith attempts to perform his contract and does so substantially although there may be a slight deviation, or some technical or unimportant omission or defect. But a failure to carry out a material part of the contract is not a substantial performance, and at least substantial performance is still indispensable to recovery under the modified rule. And indeed to permit a recovery upon the theory of substantial performance even deviations may not be intentional.¹ But where the public body can refuse to accept the work and does refuse to accept it or returns it, it is not bound to pay unless it exactly conforms with the contract. It is only where contracts for personal services or construction contracts are not fully performed but the public body accepts the fruits of the contract, and receives and retains its benefits so far as performed and furnished that it is bound to pay what these are reasonably worth. The law implies a promise to pay this for the partial performance which is accepted. This implied liability arises from the subsequent transactions or conduct of the parties, and if the party for whom the work was done does not intend to be bound by it as performed,

¹ *Denton v. Atchison*, 34 Kan. 438, 8 Pac. 750; *Monteverde v. Bd. of Superv's Queens County*, 78 Hun, 267; *Smith v. Scott's Ridge Sch. Dist.*, 20 Conn. 312; *Buckley v. Marin County*, 25 Col. App. 577, 144 Pac. 545; *Ætna Iron Wks. v. Kossuth County*, 78 Iowa, 40, 44 N. W. 215; *Filbert v. Philadelphia*, 181 Pa. St. 530, 37 Atl. 545; *Cranford v. Dist. of Columbia*, 20 Ct. Cl. 376.

the law will not make a different contract for him than that into which he entered. So if he does not accept the services or work and does not receive or retain any of the benefits this implied liability cannot arise.¹ A contractor in order to recover must honestly and in good faith have endeavored to comply with the terms and conditions of his contract.² The substitution of material one fourth in wearing quality of that provided by contract and one-half of the dimension required cannot be considered a substantial compliance or an inadvertent or unintentional deviation.³ This is so because the term substantial performance means strict performance in all essentials necessary to the full accomplishments of the purposes for which the thing contracted for was designed. Failure as to any of such features whether in good faith or bad faith, any departure from the contract not caused by inadvertence, or unavoidable omission, any defect so essential as that the object which the parties intended to accomplish to have a specified amount of work performed in a particular manner is not accomplished, is inconsistent with substantial performance of the contract.⁴ Substantial performance is performance with immaterial omissions for which compensation is made *pro tanto*. Omissions which relate to matters so essential as to defeat the objects of the parties or deviations from the plan which cannot be remedied without a partial reconstruction of a work or building cannot be said to be so unsubstantial as to be capable of compensation, without injustice, by deductions from the price. The parties are bound by their agreement and cannot escape because of impossibility to

¹ *Denton v. Atchison, supra.*

² *Buckley v. Marin County, supra; Filbert v. Philadelphia, supra.*

³ *Denton v. Atchison, supra.*

⁴ *Manning v. Ft. Atkinson Sch. Dist., 124 Wis. 84, 102 N. W. 356; Smith v. Russell, 140 N. Y. App. Div. 102.*

substantially comply with its terms. When, therefore, the action is on contract and not for quantum meruit recovery is not permitted unless a substantial performance is shown.¹ Care must be taken to not unduly extend the rule. The rule is liberal to a contractor since it allows recovery, although performance is not exact, and it cannot be extended without danger to the integrity of the contract, which is and should be the measure of the rights of the parties.² Otherwise the court is in effect making a new contract for them, compelling the public body to take whatever is tendered as performance and making the contractor secure in his compensation although the objects of the contract are not accomplished either literally or substantially. But the rule has no application where there is a willful and intentional even though slight departure from the terms of the contract.³ The question whether there has been substantial performance of a contract is ordinarily a question of fact to be decided by a jury.⁴ The measure of recovery is the contract price less the damage caused by failure to strictly perform.⁵

§ 282. Quantum Meruit.

If a contractor substantially performs his contract recovery may be had by him upon the contract, as shown, upon an allegation of performance even though the proof falls short of it. Under the same equitable rule when a con-

¹ *Littell v. Webster County*, 152 Iowa, 206, 131 N. W. 696; *McCain v. Des Moines*, 128 Iowa, 331, 103 N. W. 979.

² *Bigler v. New York*, 9 Hun, 253.

³ *Danville Bridge Co. v. Pomroy*, 15 Pa. St. 151; *Kelly v. Bradford*, 33 Vt. 35. See *Bonesteel v. N. Y.*, 22 N. Y. 165.

⁴ *Monteverde v. Queens Co.*, 78 Hun, 267; *Russell v. Iredell County*, 123 N. C. 264, 31 S. E. 717; *Elizabeth v. Fitzgerald*, 114 Fed. 547.

⁵ *Aetna Iron & Steel Wks. v. Kossuth City*, 79 Iowa, 40, 44 N. W. 215; *Walsh Const. Co. v. Cleveland*, 271 Fed. 701.

tractor in good faith endeavors to perform his contract he may recover upon quantum meruit, where there has been a substantial compliance with the terms of the contract, for the value of the benefits conferred, where these have been accepted by the public body.

CHAPTER XLI

PERFORMANCE—DELAY IN PERFORMANCE

§ 283. Performance—Time of Performance—Delay.

Delay and time necessarily run together, and consideration of the element of delay brings up the question of how essential the element of time is in the contract. Time is not generally an essential element of contract, and where it is not of the essence of the contract, a mere failure to perform, within the period specified, will not avoid the agreement.¹ A contract is not rendered void ab initio merely because the time fixed by it for completion of the work elapses before the work is actually commenced.² If time is made of the essence of a contract and the time is exceeded and the work not finished, no recovery may be had.³ Time is of the essence where a particular ordinance which provides for an improvement limits the time for completion or a general ordinance exists which requires work to be done within the agreed time.⁴ But if the contract provides for liquidated damages in case the work or structure is not completed in time, this renders the contract indefinite as to time and time will not be considered of the essence.⁵ Where the public body is the cause of the delay, the contractor is not obliged to abandon the work

¹ *Baltimore v. Raymo*, 68 Md. 569, 13 Atl. 383.

² *Idem*.

³ *Baltimore v. Raymo*, 68 Md. 569, 13 Atl. 383; *Carland v. New Orleans*, 13 La. Ann. 43; *Wheless v. St. Louis*, 90 Mo. App. 106; *Chandley v. Cambridge Springs*, 203 Pa. St. 139, 52 Atl. 87.

⁴ *Springfield v. Schmook*, 120 Mo. App. 41, 96 S. W. 257 and cases cited.

⁵ *Heman v. Gilliam*, 171 Mo. 258, 71 S. W. 163.

and bring suit for damages, but may complete the work and then bring action.¹ If the contractor delays because a public body has not sold bonds, he is responsible, as he cannot put any blame upon the public body for not having funds in its treasury in advance of the time it is due to him. Where, however, the delay is caused by the failure of the public body to make payments, the contractor is relieved of responsibility therefor.² Where the public body is at fault for delays, it cannot hold the contractor liable in the amount of stipulated damages for any delays which have been due to its fault, or to the fault of persons for whose conduct the public body is responsible.³ But where the responsibility of the contractor and the public body for delays is capable of apportionment, each must bear the responsibility for his own delays.⁴ If the public body is principally at fault and it is impossible to apportion the responsibility between it and the contractor, the contractor is relieved entirely and the stipulated damage clause becomes abrogated.⁵ Instances arise where the public body agrees to afford full opportunity to commence and prosecute the work. Until this condition precedent to performance is fulfilled the contractor's agreement as to time does not accrue.⁶ So where the public body postpones commencing the work to a more unfavorable season of the year, and the situation of the parties is so changed that they could not have intended the stipulation as to time to remain in force, no responsibility

¹ Chickasha v. Hollingsworth, 155 Pac. (Okla.) 859.

² Chandley v. Cambridge Springs, *supra*.

³ Wallis v. Wenham, 204 Mass. 83, 90 N. E. 396; Amoskeag Mfg. Co. v. U. S., 17 Wall. (U. S.) 592, 21 L. Ed. 715; Erickson v. U. S., 107 Fed. 204; Dist. of Columbia v. Camden Iron Wks., 15 App. D. C. 198.

⁴ Wallis v. Wenham, *supra*; Chandley v. Cambridge Springs, *supra*; *Contra*, Mosler Safe Co. v. Maiden Lane S. D. Co., 199 N. Y. 479, 93 N. E. 81.

⁵ Wallis v. Wenham, *supra*; Deeves v. New York, 17 N. Y. Supp. 460; Long v. Pierce County, 22 Wash. 330, 61 Pac. 142.

⁶ *Idem*.

for stipulated damages can rest upon the contractor.¹ To the extent that the public body delays the work, the parties are taken to have understood and intended that the time limit for completion is extended by the amount of such delays.² In some jurisdictions it is declared, where acts of the public body cause delay, that this abrogates the stipulated damage clause and leaves the contractor responsible only for actual damages.³ And it is also denied that there can be any apportionment of fault, or of the delays caused by mutual default.⁴

Damages may be recovered for unreasonable delay on the part of the public body in allowing the contractor to proceed, for delay in performing conditions precedent to his duty to proceed, or for unreasonable interference with the contract work or with other contractors over whom control has been reserved.⁵

Delay in performance sometimes occasions increased cost in the price of labor and materials, and when a contractor does not complete he is left without compensation for his own time and services and for the use of his plant upon the contract work which he would usually receive in the shape of profits. Where these results ensue from delay caused by the public body without right the contractor is

¹ Wallis v. Wenham, *supra*; King Iron B. & Mfg. Co. v. St. Louis, 43 Fed. 768.

² White v. Braddock Sch. Dist., 159 Pa. St. 201, 28 Atl. 136; Chicago, B. & I. Co. v. Olson, 80 Utah, 533, 83 N. W. 461; Wallis v. Wenham, *supra*; Callahan Cons. Co. v. U. S., 47 Ct. Cl. 229.

³ McClintic Marshall C. Co. v. Bd. of Chosen Freeholders, 83 N. J. Eq. 539, 91 Atl. 881; U. S. v. United Eng. Co., 234 U. S. 236, 58 L. Ed. 1294, aff'g 47 Ct. Cl. 489; Mosler Safe Co. v. Maiden Lane Safe D. Co., 199 N. Y. 479, 93 N. E. 81.

⁴ Mosler Safe Co. v. Maiden Lane S. D. Co., *supra*. See Delafield v. Westfield, 41 N. Y. App. Div. 24, 169 N. Y. 582, 62 N. E. 1095.

⁵ McMaster v. New York, 108 N. Y. 542, 15 N. E. 417; Thilemann v. New York, 82 N. Y. App. Div. 136; Rogers v. New York, 71 *Id.* 618, aff'd. 173 N. Y. 623, 66 N. E. 1115; Lentilhon v. New York, 102 N. Y. App. Div. 548, 185 N. Y. 549, 77 N. E. 1190.

entitled to sue and recover these damages. Accordingly if in fact the cost of labor and material has risen, this is a recoverable item.¹ The value of his services and his time upon the work may also be recovered.² Where he has employees whom he must keep upon salary during this period he may likewise recover such amounts as he expends, and the value of the use of his plant and machinery is also considered a loss which may be recovered.³ He must, however, allow for any compensation actually received during this period for their services from other sources.⁴ But where the contractor subsequently completes performance he may not recover for his own time and services since he will find such compensation in his profits.⁵ Where of course the public body under a reserved power or otherwise rightfully delays the work, no recovery may be had for such delay.⁶

§ 284. Varying Causes.

Where delay is occasioned in the performance of work upon a public building, because another contractor doing special work in the building had not finished his work on time, the contractor for the building may not claim damages against the public body if his failure to have his work ready on time delayed the other contractor.⁷ But where the delay is the delay of the public body or its architect or agent, because it fails to do the things which under the

¹ *King v. Des Moines*, 99 Iowa, 432, 68 N. W. 708; *Allamon v. Albany*, 43 Barb. 33; *Kelly v. U. S.*, 31 Ct. Cl. 231; *Bitting v. U. S.*, 25 Ct. Cl. 502; *Langford v. U. S.*, 95 Fed. 933.

² *Kelly v. U. S.*, 31 Ct. Cl. 361.

³ *Chickasha v. Hollingsworth*, 56 Okla. 341, 155 Pac. 859; *Cotton v. U. S.*, 38 Ct. Cl. 36.

⁴ *Cotton v. U. S. supra*. See *Figh v. U. S.* 8 Ct. Cl. 319.

⁵ *Langford v. U. S. supra*.

⁶ *Cumberland Co. Bd. v. Poxson Co.*, 196 Fed. 156, 201 Fed. 656.

⁷ *Churchyard v. U. S.* 100 Fed. 920.

contract it was obliged to do, it is liable.¹ Where several contracts are made with a contractor each of which provided the public body would require completion in a certain time after a designation of the day and place of commencing each contract, and the public body fails to give the notice, no liability for delay will arise.² Where a public body delays and suspends work because of contemplated changes of purpose in regard to the use of stone and the site, the enforced suspensions and delays are unjustifiable and are not covered by a stipulation that the stone shall be furnished as "required."³ But a contractor cannot complain of delays which occur in the completion of work when the delay is occasioned by the exercise of a power which the contract warrants.⁴ A provision that a contractor shall stand loss from unforeseen obstructions or difficulties encountered in the work will not be extended to apply to obstructions and difficulties at a changed place of work, resulting from increased depth of water and quicksand.⁵ Loss from delays caused by failure to deliver pipes which is cast upon the contractor will not include defects in them which cannot be discovered until they are being put in place.⁶

§ 285. Rejection of Materials.

Provisions in a contract, which name an inspector to see that the work corresponded with plans and specifications, and make his certificate that the work has been

¹ *W. G. Cornell Co. v. Schuylkill County*, 222 Fed. 876; *United States v. United Eng. Co.*, 234 U. S. 236, 58 L. Ed. 1294, aff'g 47 Ct. Cl. 489; *U. S. v. Smith*, 256 U. S. 11, aff'g 54 Ct. Cl. 119.

² *McClintic Marshall C. Co. v. Bd. of Freeholders*, 83 N. J. Eq. 539, 91 Atl. 881.

³ *U. S. v. Mueller*, 113 U. S. 153, 28 L. Ed. 946, aff'g 19 Ct. Cl. 581.

⁴ *Montgomery v. Mayor*, 151 N. Y. 249, 45 N. E. 550.

⁵ *Wood v. Ft. Wayne*, 119 U. S. 312, 30 L. Ed. 416.

⁶ *Idem.*

faithfully performed in accordance with the contract a condition precedent to payment, in effect constitute him a judge as to these matters. If he arbitrarily rejects materials and thereby causes delay to the contractor the latter's remedy is to disregard his rejections, go on with the work and rely on the fact that the work done and materials furnished are up to the requirement of the contract, should the public body refuse payment. The contractor cannot if he acquiesces in the inspector's rejection of materials and procures other materials, maintain an action against the public body for damages, where the execution of the work is thus delayed, on the ground that the delay was caused by such officers. For by force of the contract these officers were invested with the power of supervision and an action will not lie, especially when the delay is occasioned in the exercise of this very power of supervision which the contract warrants and which the contractor seems to recognize.¹ To protect himself the contractor must stand upon his own rights under the contract.

§ 286. Waiver.

When the contract provides for stipulated damages for each day the completion of the work is delayed beyond the time fixed, there is no waiver of the time of performance because a public body prevents a contractor from continuing work after the time for completion has expired. The very purpose of the provision is to prevent any question on this subject. This is especially true where the contract provides that acceptance of any part of the work shall not be deemed a waiver of the right to enforce the provisions

¹ *Montgomery & Mayor*, 151 N. Y. 249, 45 N. E. 550, aff'g 9 Misc. 331; *Camden I. Wks. v. New York*, 104 N. Y. App. Div. 272, modified 185 N. Y. 617, 78 N. E. 1101.

of the contract.¹ Making a part payment of the amount due after the time specified for the completion of the building, is not inconsistent with a claim for damages on account of delay in completion where enough is retained to cover the damages claimed on that account by the public body.² Waiver of performance of the contractor's agreement as to time of completion and payment after such time do not constitute waiver of a provision for stipulated damages.³ Of course a public body may waive its claim for damages on account of delays of the contractor.⁴ Strict performance of the element of time may be waived and it is waived where the public body urges a contractor to go on with the work after the contract time has expired and makes part payment.⁵ Thereafter the public body may only claim such damages as it may suffer by reason of the delay. Where the time to complete is expressly extended and the contractor does not complete the work or deliver the goods within the extended time, he will be held to the full obligation of the contract for any delay beyond the extension.⁶ Where the public body reserves the right to increase the height of a building but fails to ask that this be done until the time for entire completion had so nearly expired that this work could not be done in time, the provision for liquidated damages for failure to complete in time is waived.⁷

¹ *Macey Co. v. New York*, 144 N. Y. App. Div., 408, 208 N. Y. 514, 101 N. E. 1110.

² *Lawrence County v. Stewart*, 72 Ark. 525, 81 S. W. 1059; *Stephens v. Essex County Pk. Comm.*, 143 Fed. 844.

³ *Stephens v. Essex County Pk. Comm.*, *supra*.

⁴ *Rosser v. U. S.*, 46 Ct. Cl. 192.

⁵ *Phillips Cons. Co. v. Seymour*, 91 U. S. 46, 23 L. Ed. 341.

⁶ *Laidlaw D. G. Co. v. U. S.*, 47 Ct. Cl. 271.

⁷ *Maurer v. Sch. Dist.*, 186 Mich. 223, 152 N. W. 999.

CHAPTER XLII

DEFECTS IN PERFORMANCE

§ 287. Defects in Performance.

Defects like delays have numerous causes, and liability for defects depends upon responsibility for these varying causes, upon the acts of each party which proximately produced them. The defect may be caused by the public body in furnishing improper, insufficient or defective plans.¹ It may furnish defective materials, or allow work done to become defective by providing in the contract improper or insufficient means for its protection, but if those provided are followed the contractor is relieved.² In such cases the public body is chargeable with resulting defects and cannot shift the risk to the contractor. The contractor may not properly be held responsible when later a bridge collapses,³ because of defects in the plans furnished, or mortar or concrete disintegrates because directed to be laid in freezing weather⁴ or a building falls because materials were unsuitable or defective.⁵ So where work already exists to which new work or structures are to be added the contractor cannot be held responsible because the public body fails to remove defective work. If founda-

¹ *Hills v. Farmington*, 70 Conn. 450, 39 Atl. 795; *Indep. Sch. Dist. v. Swearn-gin*, 119 Iowa 702, 94 N. W. 206; *Bd. of Comm. Carroll County v. O'Connor*, 137 Ind. 622, 35 N. E. 1006; *Dwyer v. New York*, 77 N. Y. App. Div. 224; *MacKnight Flintic Stone Co. v. New York*, 160 N. Y. 72, 54 N. E. 661; *Dist. Columbia v. Clephane*, 13 D. C. 155, 110 U. S. 212, 28 L. Ed. 122; *Dale v. U. S.*, 14 Ct. Cl. 514; *Penn. Bridge Co. v. New Orleans*, 222 Fed. 737. See *Kinser v. State*, 125 N. Y. Supp. 46, 145 N. Y. App. Div. 41, 204 N. Y. 381, 97 N. E. 871.

² *Schliess v. Grand Rapids*, 131 Mich. 52, 90 N. W. 700.

³ *Penn. Bridge Co. v. New Orleans*, *supra*.

⁴ *Schliess v. Grand Rapids*, *supra*.

⁵ *Manville v. McCoy*, 3 Ind. 148; *Bentley v. State*, 73 Wis. 416, 41 N. W. 338.

tions left prove insufficient the contractor is relieved.¹ If a bridge proves an utter failure, because the public authorities insisted upon the use of old material in a bridge and would not consider plans which did not include its use, it matters not that the contractor drew the plans, where the public body limited his manner of drawing them and then adopted them as their own in an attempt to get other bridge builders to bid for the work. Under such circumstances the public body is responsible.² Where of course a building or structure collapses without fault of the public body but because of defective work done by the contractor or defects in the plans which he has adopted as sufficient, the contractor will be responsible.³ If the contractor fails to perform his work in accordance with specifications the public body is not obligated to accept the work, and upon refusal is not even liable upon a quantum meruit. The public body may likewise refuse to accept defective performance, and no liability either upon the contract or upon quantum meruit can arise against it.⁴

The damages recoverable for defective performance consist of the difference in value between what is tendered as performance and what is due and required by the terms of the contract.⁵ If the contractor is justified in abandoning the work the public body may not recover any damages for his failure to fully perform.⁶

¹ *Gibbons v. U. S.* 15 Ct. Cl. 174, aff'd 109 U. S. 200, 27 L. Ed. 906.

² *Holland v. Union County*, 68 Iowa, 56, 25 N. W. 927.

³ *Lake View v. MacRitchie*, 134 Ill. 203, 25 N. E. 663; *Shoenberger v. Elgin*, 164 Ill. 80, 45 N. E. 434. See *Thorn v. Mayor*, L. R. 1 App. Cas. 120, aff'g 44 L. J. Exch. 62; *DeMoth & Rose v. Hillsboro Indep. Sch. Dist.*, 186 S. W. (Tex. C. A.,) 437.

⁴ *Bonesteel v. New York*, 22 N. Y. 162; *Denton v. Atcheson*, 34 Kan. 438, 8 Pac. 750.

⁵ *Converse Br. Co. v. Geneva County*, 168 Ala. 432, 53 So. 196; *Wiley v. Athol*, 150 Mass. 426, 23 N. E. 311, 6 L. R. A. 342.

⁶ *San Francisco Bridge Co. v. Dumbarton L. Co.*, 119 Cal. 272, 51 Pac. 335.

CHAPTER XLIII

PERFORMANCE—EXCUSE FOR NON-PERFORMANCE—IM- POSSIBILITY OF PERFORMANCE

§ 288. Impossibility of Performance—Unforeseen Conditions.

Where an executory contract is made wherein a contractor absolutely agrees to perform some act which is possible in itself, he is not excused if he is unable to execute it through unforeseen conditions, accident or misfortune, but he must perform or pay damages.¹ The only way he can protect himself is by appropriate stipulations in his contract against these contingencies.² There are, however in the nature of many contracts implied conditions by which a contractor is relieved from his unqualified obligation because the law at its making has qualified it. And, when in such event, without his fault, performance is rendered impossible, it may be excused.³ When it is inherently known to and contemplated by the parties at its making that the fulfillment of the contract is dependent upon the continuance or existence of certain things or conditions essential to its due execution, if before default they cease to exist and thereby, without fault, performance becomes impossible, the contractor is relieved from the consequences of his failure to perform, by virtue of this implied condition, to which his contract is made subject

¹ *Kinser Cons. Co. v. State*, 125 N. Y. Supp. 46, 145 App. Div. 41, 204 N. Y. 381, 97 N. E. 871; *Jones v. U. S.*, 96 U. S. 24, 24 L. Ed. 644, aff'g 11 Ct. Cl. 733.

² *Kinser Cons. Co. v. State*, *supra*; *Jones v. U. S.*, *supra*.

³ *Kinser Cons. Co. v. State*, *supra*.

by force of law.¹ It is because the parties intended the exception that the law implies the condition.

There are accordingly many exceptions to the rule that accident or unforeseen conditions, arising without the fault of either party, will not excuse performance of an absolute executory contract. Four have been stated to be the quantum of exceptions.² But a fifth at least should be added.³ These exceptions are as follows: 1. Where performance of the contract is absolutely impossible. 2. Where it becomes legally impossible. 3. Where the specific thing which is essential to the performance of the contract is destroyed. 4. Where through sickness or death personal services become impossible. 5. Where conditions essential to performance do not exist.

§ 289. Where Performance is Absolutely Impossible.

It is a truism that impossible conditions cannot be performed. A contract requiring the performance of these contradicts itself. If therefore a person contracts to do something absolutely impossible at the time, not subsequently, the contract will have no binding force, because no man can be obliged to perform an impossibility.⁴ It is only where the thing is possible in itself and the party absolutely engages to perform it, that performance will not be excused by the occurrence of inevitable accident or other contingency or difficulty, although it was not foreseen by the party and was beyond his control.⁵ But the impossibility which releases a contractor from the obliga-

¹ *Kinser v. State* (N.Y. Ct. Cl.) 125 N. Y. Supp. 46.

² *Idem*.

³ *Jones v. U. S.*, *supra*.

⁴ *Jones v. U. S.*, 96 U. S. 24, 24 L. Ed. 644, aff'g 11 Ct. Cl. 733; *Cameron-Hawn Realty Co. v. Albany*, 207 N. Y. 377, 101 N. E. 162.

⁵ *Jones v. U. S.*, *supra*.

tion to perform his contract must be a real impossibility and not a mere inconvenience.¹

§ 290. Where Legal Impossibility Arises—General Rule.

Where the performance of a contract which was lawful in its inception becomes unlawful or legally impossible of performance by reason of any subsequent act or event, the contract is thereby dissolved or terminated, in so far as it remains executory, and both parties are excused from its further performance.²

§ 291. Legal Impossibility—Operation of Law—Frustration of Objects.

Where a contract for public work provides that the contract price is not to be paid until the final completion of the work and after part performance further execution becomes impossible by the act of the law, the performance of the required condition becomes ineffective and the contractor is entitled to recover without showing a compliance in this regard.³ Where a contractor with the State sublet a part of his work and subsequently when the work was partly performed the contractor was prevented by authority of the State, through the passage of a statute from completing performance, the subcontractor may only recover under the contract for the work done.⁴ But neither the contractor nor the subcontractor can claim loss of profits against the other, since neither party is at fault and there is no breach of the agreement by either party.⁵ But where the performance by the contractor is

¹ *Smoot's Case*, 82 U. S. (15 Wall.) 36, 21 L. Ed. 107.

² *Brick Presb. Church v. New York*, 5 Cow. 538; *Jones v. Judd*, 4 N. Y. 411; *U. S. v. Dietrich*, 126 Fed. 671; *Anglesea v. Rugeley*, 6 Q. B. 107, 114; *Brewster v. Kitchen*, 1 Ld. Ray, 317, 321.

³ *Jones v. Judd*, 4 N. Y. 411.

⁴ *Idem.*

⁵ *Jones v. Judd*, 4 N. Y. 411; *Devlin v. New York*, 63 N. Y. 8.

prevented by the act or omission of the public body he has his election to treat the contract as rescinded and recover on quantum meruit, for the value of his labor and materials furnished, or he may sue upon the contract and recover for the work completed according to the contract and for loss in profits, or otherwise which he sustained.¹ Where a contract was made by the United States with a contractor who later became a member of Congress, his position as a public official immediately terminated the contract as partly performed, by virtue of section 3739 of the Revised Statutes, which became a part of the contract at the time it was made, and dissolved it when he became an officer of the government authorized to make contracts.² This rule that where a contract becomes impossible of performance by operation of law, performance is excused, is based upon an implied condition of the contract. So whether the illegal situation is forced into a contract by act of the legislature making further performance illegal, or by act of a court through process of injunction or otherwise, the result is the same.³

Where an act or thing contracted to be done is subsequently made unlawful by act of the legislature, the promise is avoided. And where performance depends upon the continued existence of a thing which is assumed as a basis of the agreement, the destruction of the thing by the enactment of a law terminates the obligation.⁴ But,

¹ *Danolds v. State*, 89 N. Y. 36; *Lord v. Thomas*, 64 N. Y. 107; *Jones v. Judd*, 4 N. Y. 411.

² *U. S. v. Dietrich*, 126 Fed. 671.

³ *Advertiser Co. v. State*, 193 Ala. 418, 69 So. 501; *Burkhardt v. Georgia Sch. Tp.*, 9 S. D. 315, 69 N. W. 16; *Jones v. Judd*, *supra*. See *Webb Granite & Cons. Co. v. Worcester*, 187 Mass. 385, 73 N. E. 639. See *Wade v. Brantford*, 19 U. C. Q. B. 207.

⁴ *Advertiser Co. v. State*, *supra*; *Monaca v. Monaca St. Ry. Co.*, 247 Pa. St. 242, 93 Atl. 344.

because the public body happens to be a party to a contract, it does not surrender its sovereign right and duty to legislate, and therefore the passage of a general law which affects the contractor and the general public equally is not a breach and will not relieve from performance.¹ The adoption of new rules governing the inspection and acceptance of work or supplies or goods purchased, so long as they are reasonable and intended to prevent frauds, which were constantly perpetrated, do not constitute a breach or excuse performance.²

The law of the land constitutes a part of every contract. When performance of a contract becomes impossible non-performance is excused by reason of an implied condition of the contract. Where the legal impossibility arises by operation of law from the exercise of a power conferred upon a public body or one of its boards or agents, non-performance is excused. Thus when the performance of a contract of employment as a teacher becomes impossible by reason of the exercise of a power conferred upon health authorities to close a school to prevent an epidemic, the contract becomes unenforceable and no recovery may be had by such teacher during the period of suspension.³ If, however, a school house is burned down the obligation to teach continues, since another place to hold school may be obtained, and so the public obligation to pay survives.⁴

Where the construction of a reservoir contract was suspended under the Defense of the Realm Act which made it illegal to continue, the performance was thus

¹ Denning *v.* U. S., 1 Ct. Cl. 190; Jones *v.* U. S., 1 Ct. Cl. 383.

² U. S. *v.* Wormer, 13 Wall. 25; Smoot's Case, 82 U. S. (15 Wall.) 36, 21 L. Ed. 107.

³ Gregg School Tp. *v.* Hinshaw, — Ind. App.—, 132 N. E. 586.

⁴ Smith *v.* Pleasant Pl. Sch. Dist., 69 Mich. 589, 37 N. W. 567; Cashen *v.* Sch. Dist., 50 Vt. 30.

rendered illegal and the object of the contract frustrated by an interruption which changed its conditions vitally and fundamentally and so the contract became determined.¹

§ 292. Act of God—Inevitable Necessity.

Where an obligation or duty is imposed upon a person by law, he is absolved from liability for non-performance of the obligation if his performance is rendered impossible without his fault by an act of God or an unavoidable accident, sometimes alluded to as inevitable necessity.

This rule does not generally apply to contract obligations. The general rule as to these is that a contractor, who makes an absolute agreement to do a lawful act, is not relieved from liability for a failure to fulfill his promise by a subsequent impossibility of performance caused by an act of God or unavoidable accident. The reason for the rule is that he voluntarily agrees to perform the act without any reservation or exception, which if he desired, he could make in his agreement.² Nevertheless, as said above, when it is the law that creates the duty or charge and the party is unable to perform it without default on his part, the law excuses. The law never exacts performance, where it will involve a violation of law. Against

¹ *Metropolitan Water Bd. v. Dick*, 87 L. J. K. B. 370, aff'g 86 L. J. K. B. 675. See *Leiston Gas Co. v. Leiston-Cum-Sizewell Urban Council*, 85 L. J. K. B. 1759.

² *School Dist. v. Dauchy*, 25 Conn. 530, 68 Am. Dec. 371; *Dewey v. Alpena Sch. Dist.* 43 Mich. 480, 5 N. W. 646, 38 Am. R. 206; *Cameron-Hawn Realty Co. v. Albany*, 207 N. Y. 377, 101 N. E. 162; *Phoenix B. Co. v. U. S.*, 38 Ct. Cl. 492; *Dermott v. Jones* (*Ingle v. Jones*), 2 Wall. (U. S.) 1, 17 L. Ed. 762; *Jones v. U. S.*, 96 U. S. 24, 24 L. Ed. 644, aff'g 11 Ct. Cl. 733; *Link Belt Eng. Co. v. U. S.*, 142 Fed. 243, 247; *U. S. v. Lewis*, 237 Fed. 80; *Meriwether v. Lowndes County*, 89 Ala. 362, 7 So. 198; *Rowe v. Peabody*, 207 Mass. 226, 93 N. E. 604; *Trenton v. Bennett*, 27 N. J. L. 515; *Mitchell v. Hancock County*, 91 Miss. 414, 45 So. 571; *Dist. Tp. of Union v. Smith*, 39 Iowa, 9; *Monaca v. Monaca St. Ry.*, 247 Pa. St. 242, 93 Atl. 344; *Gathwright v. Calloway County*, 10 Mo. 663; *Hall v. Sch. Dist.*, 24 Mo. App. 213.

predicaments not of his own creation, such as the parties never understood as possible, legitimate consequences of the contract, a contractor is not bound to protect himself.¹ Thus where a railroad company may not proceed to carry out its contract and construct its road without the consent of certain municipalities, through whose territory it had contracted to build, the obligation which the law put upon it not being fulfilled without its fault, it is relieved of the obligation.² The rule that an act of God or inevitable necessity will not relieve from an absolute promise is not applied to executory contracts for personal services, nor for the sale of specific chattels, nor for the use of particular buildings, because in these contracts there is in their very nature an implied condition that if the person or thing shall not be in existence at the time stipulated for performance it shall not be required.³ An implied condition exists in executory contracts to the effect that their performance shall not be rendered impossible, by the intervention of unforeseen, accidental and uncontrollable superior agencies and that their performance is excused when prevented by such agencies, as where there is a contract for the delivery of specific property at a future time and before the time for delivery arrives the property is destroyed by inevitable accident.⁴ But it is an important element of that rule that the intervention of such causes will not excuse performance when the essential purposes of the contract are still capable of substantial accomplishment, even though a literal performance has become physically impossible.⁵

¹ *Monaca v. Monaca St. Ry. Co.*, *supra*; *Meriwether v. Lowndes County*, *supra*; *Mitchell v. Hancock County*, 91 Miss. 414, 45 So. 571.

² *Monaca v. Monaca St. Ry. Co.*, *supra*.

³ *Cameron-Hawn Realty Co. v. Albany*, *supra*.

⁴ *Bd. of Educ. Bath Tp. v. Townsend*, 63 Ohio St. 514, 59 N. E. 223. See *Willington v. West Boylston*, 21 Mass. 101.

⁵ *Bd. of Educ. Bath Tp. v. Townsend*, *supra*.

§ 293. The Same—Inevitable Necessity—Destruction of Subject.

One who voluntarily enters into an absolute contract to perform certain work, furnish certain materials or supplies or erect a completed structure is bound to do it unless it is absolutely impossible.¹ If one contracts to erect a building upon the land of a public body, performing the labor and supplying the material, and before the building is completed or accepted, it is destroyed by fire or other casualty, the loss falls upon the contractor, and he must rebuild. The reason is that the thing may be still done and he has contracted to do it. His contract is to deliver a completed structure and this may be done by erecting it over again.² If he agrees to erect and complete a building upon a particular site, no matter what the expense, he must provide such a foundation, upon that spot, as will sustain it. If he does not and the building falls down or is blown down he must reërect it as it matters not whether the consequence occurs through his fault or without his fault. Such a contract is absolute, clear and unqualified, and must be performed.³ Sometimes contracts of this nature are subject to implied conditions which will excuse performance. Where, from the situation of the parties at the time the contract was

¹ *Krause v. Crothersville*, 162 Ind. 278, 70 N. E. 264, 65 L. R. A. 111; *Board of Educ. Bath Tp. v. Townsend*, 63 Ohio St. 514, 59 N. E. 223; *Young v. Chicopee*, 186 Mass. 518, 72 N. E. 63; *Sch. Dist. v. Dauchy*, 25 Conn. 530; *Eaton v. Sch. Dist.*, 23 Wis. 374; *Trenton v. Bennett*, 27 N. J. L. 513; *Kinzer v. State* 125 N. Y. Supp. 46, 145 N. Y. App. Div. 41, 204 N. Y. 381, 97 N. E. 871; *Cameron-Hawn Realty Co. v. Albany*, 207 N. Y. 377, 101 N. E. 162; *Livingston County v. Graves*, 32 Mo. 479; *Bentley v. State*, 73 Wis. 416, 41 N. W. 338; *Chapman v. Montgomery W. P. Co.*, 126 Fed. 372; *Dale v. U. S.*, 14 Ct. Cl. 514; *Jones v. U. S.*, 96 U. S. 24, 24 L. Ed. 644, aff'g 11 Ct. Cl. 733; *Siekels v. U. S.*, 1 Ct. Cl. 214.

² *Trenton v. Bennett*, *supra*.

³ *Idem*.

made, it is apparent that they must have known that its performance would be impossible unless a thing then in existence should continue to exist, or some condition or thing should come into existence before performance and remain in existence during performance, there arises an implied condition of the contract that if that thing or condition is destroyed or prevented from coming into existence before the time of performance, without the fault of the party bound to go forward with performance, either by act of God or by an unavoidable accident, such party will be absolved from liability for failure to perform.¹ But if a contract is to expend labor upon a specific subject, the property of another, or to bestow labor and materials upon a particular building or chattel as to shoe his horse, or slate or paint his building or put an annex or addition thereto or make repairs or alterations therein, it is obvious that its destruction prevents a compliance with the undertaking. So, if the horse dies or the building is destroyed by fire, lightning, flood or tornado before the work is done, the performance of the contract becomes impossible and with the principal substance perishes the incident. In such a case the contractor is relieved from further performance.² He may not sue on the contract for he has not performed the contract so that its stipulations may be availed of, but he may sue on quantum meruit for the reasonable value of the work done.³ Where, however, the contract provided for payment of a stated sum during the progress of the work and such sum has been paid, no further recovery will be permitted

¹ *Krause v. Crothersville, supra; Young v. Chicopee, supra; Trenton v. Bennett, supra.*

² *Trenton v. Bennett, supra; Krause v. Crothersville, supra; Young v. Chicopee, supra.*

³ *Krause v. Crothersville, supra; Young v. Chicopee, supra.*

even on quantum meruit.¹ The liability imposed upon a public body only extends to require payment for such labor and materials as have actually been made a part of the structure destroyed.² A contractor agreeing to deliver a certain kind of hay during a certain period is excused from performance, within these principles, where there is an entire failure of the crop of that particular kind of hay during the period.³ But unforeseen difficulties or hardships will not excuse him.⁴ A strike at the mines will not relieve from an absolute contract to furnish coal.⁵ Where a contractor absolutely agrees to construct a tunnel, and agrees to take all responsibility for losses on account of the nature or character of the soil, for which the public body denied all responsibility, and where he is warned that there may be such difficulties, and later he encounters them and abandons his agreement, he cannot excuse it because the nature of the ground makes performance practically impossible or impracticable without a very large and disproportionate expense.⁶ Courts will not consider the hardship or the expense or the loss to the one party or the meagerness or the uselessness of the result to the other. They will neither make nor modify contracts nor dispense with performance. The party who creates a duty or charge upon himself is bound to a possible performance of it, because he promises it and fails to protect himself by suitable conditions or qualifica-

¹ Krause v. Crothersville, *supra*.

² Young v. Chicopee, *supra*.

³ Browne v. U. S., 30 Ct. Cl. 124.

⁴ Penn. Bridge Co. v. Kershaw County, 226 Fed. 728; U. S. v. Gleason, 175 U. S. 588, 44 L. Ed. 284; Lewman v. U. S., 41 Ct. Cl. 470; Dewey v. Union Sch. Dist. of Alpena, 43 Mich. 480, 5 N. W. 646; St. Joseph County v. South Bend & M. St. Ry. Co., 118 Ind. 68, 20 N. E. 499.

⁵ Peabody v. U. S., 45 Ct. Cl. 532.

⁶ Rowe v. Peabody, 207 Mass. 266, 93 N. E. 604. See Kinser v. State, 125 N. Y. Supp. 46, 145 App. Div. 41, 204 N. Y. 381, 97 N. E. 871.

tions.¹ Parties who fairly and voluntarily assume hard bargains cannot claim relief from them for that cause.² Nor will the law relieve a man from a contractual obligation because he believes with good cause that the person with whom he has contracted will be unable to perform.³

One making an absolute contract is bound to respond in damages for its non-performance. If after he has substantially but not completely finished a structure and before its delivery it is destroyed by fire, he is liable to an action for money advanced upon the contract and damages for its non-performance.⁴

§ 294. Cancellation of Contract Rendering Performance of Subcontractor Impossible.

Parties cannot be relieved of contracts fairly made with full knowledge of the facts, although they mistake their rights or fail sufficiently to qualify and limit their liabilities.⁵ If a contractor makes an absolute contract with a subcontractor to do certain work, and he fails to provide in it that in case his principal contract with the public body is terminated under a reserved power so to do or for other cause, a contingency which may be foreseen and provided against in the subcontract, and later the contract is cancelled by the issuance of a certificate by the engineer that the contract is not progressing so as to indicate its completion within the time limited for performance the subcontractor may recover his damages.⁶ The contractor may protect himself by providing that his

¹ *Cameron Hawn R. Co. v. Albany*, 207 N. Y. 377, 101 N. E. 162.

² *Southington v. Southington Water Co.*, 80 Conn. 646, 69 Atl. 1023.

³ *Coonan v. Cape Girardeau*, 149 Mo. App. 609, 129 S. W. 745. But see *Cramp & Sons Co. v. U. S.*, 50 Ct. Cl. 179.

⁴ *Tompkins v. Dudley*, 25 N. Y. 272.

⁵ *John Soley & Sons v. Jones*, 208 Mass. 561, 95 N. E. 94.

⁶ *Idem.*

promise is dependent upon the continued existence of the principal contract. Such a condition may be implied if the principal contract is in its entirety incorporated into the subcontract by reference, but it will not be read into the latter by implication. By an absolute promise the contractor will make himself responsible for the continued existence of the subject-matter of the contract until its performance is completed without fault by the subcontractor.¹

Where the contract is not dissolved, a subcontractor is not limited to compensation for the fair value of the work done with a reasonable profit for such work and also upon the work remaining to be done. Nor is he restricted to a sum which would be proportionate to the contract price which the contractor would receive from the public body. On the contrary, he is entitled to the benefit of his contract, after deducting from it the reasonable cost of completing the work.² But the rule is otherwise where further performance is prevented, by authority of the State through passage of a statute.³

§ 295. Sickness—Death.

The act of God in the death of a party will not dissolve the contract or excuse performance except in the case of a contract requiring personal service, and then the law will imply an exception.⁴ If personal services are not contemplated or required, performance is not excused because of sickness or other disability.⁵ Contracts of this character

¹ John Soley & Son *v.* Jones, *supra*.

² *Idem*.

³ Jones *v.* Judd, 4 N. Y. 411. See Devlin *v.* New York, 63 N. Y. 8. See § 291.

⁴ Devlin *v.* Mayor, 63 N. Y. 8; Hall *v.* Sch. Dist., 24 Mo. App. 213; Cameron-Hawn Realty Co. *v.* Albany, 207 N. Y. 377, 101 N. E. 162. See Willington *v.* West Boylston, 21 Mass. 101.

⁵ West Chicago Park Commr's *v.* Carmody, 139 Ill. App. 635.

for personal services, whether of the contracting party or of a third person, requiring skill and which can only be performed by the particular person named, are not in the nature of an absolute obligation under all circumstances. There is an implied condition that the person shall be able to perform the services at the time fixed for performance, and if he dies, or without fault on the part of the promisor he becomes disabled, the obligation to perform is extinguished.¹ But sickness will not admit of recovery upon an entire and indivisible contract which has not been performed.²

§ 296. Where Conditions Essential to Performance do not Exist.

Where a contractor enters into a contract to perform public work and contingencies arise which the contract does not expressly cover, and which render performance of the contract as intended and planned impossible, and make necessary substantial changes in the nature and cost of the work and bear materially upon the remainder of the work, the law reads into the contract, as of its inception, the implied condition that such contingency will terminate the contract.³ It is not necessary that the parties had the contingency in mind, for had they considered it, they would have provided against it. It is not something which the parties omitted and the courts will feel justified in supplying, but something which will be implied by force of law.⁴

In such a situation the contract is at an end and both

¹ *Devlin v. Mayor, supra*; *Cameron-Hawn Realty Co. v. Albany, supra*; *Jones v. Judd*, 4 N. Y. 411; *People v. Manning*, 8 Cowen, 297.

² *Davidson v. Gaskill*, 32 Okla. 40, 121 Pac. 649.

³ *Kinser Cons. Co. v. State*, 125 N. Y. Supp. 46, 145 N. Y. App. Div. 41, 204 N. Y. 381, 97 N. E. 871.

⁴ *Idem*.

parties are excused from further performance. Where the work has been stopped, under a stop order issued by the public body because of natural conditions of the soil which render further performance impossible, the contractor is entitled to recover for work done and for benefits received by the public body under the contract down to the time the conditions were discovered and for such damages as may have resulted from the stop order. He may not recover for loss of profits or items of expense which he would have been entitled to recover had there been a breach.¹

§ 297. Physical Impossibility—Impracticability.

Where a contract contemplates the doing of work or the furnishing of a commodity so long as it is reasonably possible to do so, the rule that where a contracting party undertakes to do something which he afterwards finds to be impossible, he nevertheless must suffer the consequences of the violation of his contract, has no application.² Where the nature of the venture is uncertain and this was clearly in the minds of the parties, and the contract was not to furnish a commodity at all events, but if reasonably possible, he is entitled to have these facts considered in determining his liability.³ Indeed there are some contracts into which the law itself will write the word reasonably, as unavoidably within the contemplation of the parties. Where a contract provides for additions and changes in the work as are necessary, the law implies the term "reasonably" before the term "necessary." This protects the contractor against unreasonable action, and the public body against unforeseen conditions which defeat the origi-

¹ Kinser v. State, *supra*.

² Jackson County Light H. & P. Co. v. Independence, 188 Mo. App. 157, 175 S. W. 86.

³ *Idem*.

nal plan. Reasonable necessity will not require absolute or physical impossibility, but even though possible from an engineering standpoint, if the expense to perform it, under the conditions revealed is so enormous as to make it impracticable, performance is impossible within the meaning of the contract.¹

¹ *Kinser Cons. Co. v. State*, 205 N. Y. 381, 97 N. E. 871.

CHAPTER XLIV

PERFORMANCE—EXCUSE FOR NON-PERFORMANCE OCCASIONED BY ACT OF PUBLIC BODY

§ 298. **Non-Performance Occasioned by Act of Public Body.**

Good faith is an essential element of all contracts and is an implied condition of every contract.¹ There is an implied undertaking upon the part of each party that he will not intentionally and purposely do anything to prevent the other party from carrying out the agreement.² It is a violation of these conditions for one to voluntarily put it out of his power to perform a contract. A party who prevents performance by his own act is in no position to object that the contract remains unperformed, and when performance is thus rendered impossible by the act of the public body or its agents, non-performance is excused.³

Where the officers and agents of a public body arrest a contractor's work and prevent the fulfillment of his contract and this is done with an honest view to obtain for the public some lawful benefit or advantage, reason and justice require that the public body in its corporate capacity shall be liable for the acts thus done.⁴

A contractor thus prevented from proceeding may abandon his contract and justify his conduct because of the acts

¹ *Gardner v. Cameron*, 155 N. Y. App. Div. 750.

² *Cameron-Hawn Realty Co. v. Albany*, 207 N. Y. 377, 101 N. E. 162.

³ *Murphy v. St. Louis*, 8 Mo. App. 483.

⁴ *Kingsley v. Brooklyn*, 78 N. Y. 200; *Mahan v. Mayor*, 10 Misc. 664; *U. S. v. United Eng. Co.*, 234 U. S. 236, 58 L. Ed. 1294, aff'g 47 Ct. Cl. 489; *U. S. v. Peck*, 102 U. S. 64, 26 L. Ed. 46; *Soulard v. St. Louis*, 36 Mo. 546; *Hawks v. Charlemont*, 107 Mass. 414.

of the public body.¹ Where a contractor with the government agreed to furnish hay contemplated to be obtained from a certain source, and the supply of hay which he depended upon was taken away by the government, this hindrance to the performance of his contract excused his non-performance.² If suspension of work is caused by the direct act of the public body, and is not occasioned by unwillingness of the contractor to comply with his contract, the contractor is likewise excused.³ But interference by the public body to prevent the contractor from doing his work improperly may not be claimed as an excuse for failure to perform.⁴ Under some circumstances the contractor is limited to a recovery upon quantum meruit and may not sue upon the contract.⁵ But a contractor whose executory contract is unjustifiably abrogated is entitled, notwithstanding the wrongful acts of the public body, to the profits and advantages which would have enured to him as the direct and immediate fruits of the contract, had he been permitted to perform it. Where he is wrongfully deprived of the gains and profits of his executory contract he may recover as an equivalent, and by way of damages, the difference between the contract price, the amount which he would have earned and been entitled to recover on performance, and the amount which it would have cost him to perform.⁶ His loss consists, where he has partly performed, of two items or grounds of damage, first, what he has already expended

¹ *Devlin v. Mayor*, 63 N. Y. 8; *Jones v. Judd*, 4 N. Y. 411; *Mahan v. Mayor*, *supra*; *U. S. v. Behan*, 110 U. S. 338, 28 L. Ed. 168.

² *U. S. v. Peck*, 102 U. S. 64.

³ *Wood v. U. S.*, 49 Ct. Cl. 119.

⁴ *Douglas v. Lowell*, 194 Mass. 268, 80 N. E. 510.

⁵ *Glidden State Bk. v. Sch. Dist. of Jacobs*, 143 Wis. 617, 128 N. W. 285.

⁶ *Masterson v. Mayor*, 7 Hill, 61; *Clark v. Mayor*, 4 N. Y. 338; *Devlin v. Mayor*, 63 N. Y. 8; *Long Island C. & S. Co. v. New York*, 204 N. Y. 73, 97 N. E. 483.

toward performance, less the value of materials on hand, second, the profits that he would have realized, so long as they are not too speculative and remote. If he undertakes to prove profits, these will be measured by the difference between the cost of doing the work and what the contractor was to receive for it.¹

§ 299. Abandonment of Contract by Public Body During Performance—Remedy of Contractor—Damages—Injunction.

Public bodies cannot be compelled to proceed with the prosecution of a public work at the instance of a contractor with whom the public body has made a contract for such work. Public bodies stand in this respect in the same position as individuals, and may at any time violate, abandon or renounce their contracts or enterprises which they have undertaken. They may refuse to allow the contractor to proceed, or may assume the control of the work and perform the work included in the contract by their own immediate servants or agents, or they may let a new contract for its performance by other persons. All of this may be done, although there has been no default upon the part of the contractor, upon the usual terms of compensation in damages which are recognized and allowed by law.² The public body may thus violate its contract, but the obligation remains and cannot be impaired by the refusal of the public body to perform.³

If in such a case the public body undertakes to let a

¹ *U. S. v. Behan*, 110 U. S. 338, 28 L. Ed. 168; *Speed's Case*, 2 Ct. Cl. 429, aff'd 8 Wall. 77, 19 L. Ed. 449, S. C. 7 Ct. Cl. 93.

² *Lord v. Thomas*, 64 N. Y. 107; *Danolds v. State*, 89 N. Y. 36; *Wakefield Cons. Co. v. New York*, 157 N. Y. App. Div. 535, 213 N. Y. 633, 107 N. E. 1087; *Sewer Commr's v. Sullivan*, 11 N. Y. App. Div. 472, 162 N. Y. 594, 57 N. E. 1123.

³ *Lord v. Thomas*, *supra*; *Danolds v. State*, *supra*; *U. S. v. Behan*, 110 U. S. 338, 28 L. Ed. 168.

new contract to complete a work under authority of law, the courts will not enjoin it from proceeding to execute the authority conferred by advertising for new bids.¹ A threat to abandon work not followed by actual abandonment by the contractor or injury to the public body will not justify expulsion from the work or forfeiture of the rights of the contractor. As long as the work continues and no injury or change of situation occurs by reason of what is merely said, the public body has no right of complaint and may not act as if an actual abandonment had taken place. If it does, the contractor may recover the damages he sustains.²

¹ Lord *v.* Thomas, *supra*.

² Sewer Commr's *v.* Sullivan, *supra*.

CHAPTER XLV

PERFORMANCE—ACCEPTANCE OF

§ 300. **Acceptance of Work.**

If a contract is not completed within the time specified or not properly performed, but is accepted by the proper public authorities, such acceptance is binding in the absence of fraud.¹ If at the time of acceptance the public body has a right of action against the contractor for failure to comply with the contract, because of defective construction or because of failure to complete in time, such action is not waived or barred by reason of the acceptance.²

The mere use and occupancy of a building, bridge or roadway erected or repaired not in conformity with the contract is not to be considered an acceptance of the work as a fulfillment of the contract. Acceptance cannot result from the mere use of the work or structure by the public,³ nor even from a making of repairs to it after such use.⁴ If a contractor neglects and refuses to complete his contract in a material point, the public body does not waive its performance by taking possession of and occupying the structure in its defective condition. The public body are not put in the absurd alternative either of losing and

¹ *Mesabo City Water Co. v. Mesabo*, 136 Mo. 498, 38 S. W. 89; *Harris County v. Campbell*, 68 Tex. 22, 3 S. W. 243.

² *Mesabo City Water Co. v. Mesabo*, *supra*.

³ *New York v. Dexter*, 59 Misc. (N. Y.) 157; *Douglas v. Lowell*, 194 Mass. 268, 80 N. E. 510; *Taft v. Montague*, 14 Mass. 282, 7 Am. Dec. 215; *Reed v. Bd. of Educ.*, 4 Abb. App. Dec. 24; *Willey v. Fractional Sch. Dist.*, 25 Mich. 419; *Smith v. Scott's Ridge Sch. Dist.*, 20 Conn. 312.

⁴ *Taft v. Montague*, *supra*.

abandoning the structure or of occupying it at the peril of paying for work not performed and of waiving thereby the performance of substantial covenants of the contract.¹ It is not a waiver of defects to use and occupy a structure.² A public body is entitled to retain without compensation the benefits of a partial performance, where from the nature of the contract it must receive such benefits in advance of performance, and by its terms or just construction it is under no obligation to pay until performance is complete.³ Even payment and acceptance will not prevent recovery by the public body for latent defects discovered after payment and acceptance. The right of action for damages therefor will survive.⁴ The acceptance of work as it progresses which is approved and passed by the officers of the public body is, however, binding as an acceptance.⁵ Where an individual owner of property questions the validity of an assessment therefor he is bound by acceptance of the work by the public authorities. In the absence of fraud or collusion such acceptance is conclusive evidence that the work was performed according to the requirements of the contract.⁶

§ 301. Waiver of Strict Compliance.

It is elementary that strict compliance with the terms of a public contract on the part of one party may be waived by the other, so long as the requirement or term

¹ *Reed v. Bd. of Educ.*, *supra*.

² *Idem*.

³ *Bonesteel v. Mayor*, 22 N. Y. 166.

⁴ *U. S. v. Walsh*, 115 Fed. 697.

⁵ *Brady v. New York*, 132 N. Y. 415, 30 N. E. 757; *Lamson v. Marshall*, 133 Mich. 250, 95 N. W. 78.

⁶ *Emery v. Bradford*, 29 Cal. 75; *Dixon v. Detroit*, 86 Mich. 516, 49 N. W. 628; *State v. McCardy*, 87 Minn. 88, 91 N. W. 263; *Chance v. Portland*, 26 Oreg. 286, 38 Pac. 68; *Mason v. Des Moines*, 108 Iowa, 658, 79 N. W. 389.

waived is one made by the contract itself.¹ While statutory provisions may not be waived by a public body, the terms of the contract may be waived.

¹Capital City B. Co. *v.* Des Moines, 127 N. W. (Iowa) 66; Atkinson *v.* Davenport, 117 Iowa, 687, 84 N. W. 689; People *ex rel.* Ready *v.* Mayor, 65 Hun, 321, 144 N. Y. 63, 38 N. E. 1006; Central Bitulithic Pav. Co. *v.* Mt. Clemens, 143 Mich. 259, 106 N. W. 888; Wiley *v.* Athol, 150 Mass. 426, 23 N. E. 311; Farrelly *v.* U. S., 159 Fed. 671; Ittner *v.* U. S., 43 Ct. Cl. 336.

CHAPTER XLVI

PERFORMANCE AND BREACH

§ 302. Performance—Discharge of Contract—By Breach—Failure to Make Payment.

When a public body employs a contractor to perform certain work and agrees to compensate him by installment payments to be made periodically or as the work progresses, the failure to make a payment at the time when it becomes due is such a breach of a material term as justifies the contractor in refusing to complete the contract and entitles him to recover the value of his work up to the time of the abandonment.¹ This is especially true in building and construction contracts calling for the performance of labor and furnishing of materials covering a long period of time and involving large expenditures. A provision for payments on account as the work progresses in such a contract must be deemed so material that a substantial failure to pay will justify the contractor in declining to proceed.² It must have been in the contemplation of the parties that the contractor could not be expected to finance the operation to completion without receiving the stipulated payments on account as the work progressed. A substantial compliance with the stipulation

¹ *Devlin v. New York*, 124 N. Y. App. Div. 184; *Price v. New York*, 104 *Id.* 198, 182 N. Y. 516, 74 N. E. 1124; *Peet v. East Grand Forks*, 101 Minn. 518, 112 N. W. 1003; *Sch. Dist. v. Hayne*, 46 Wis. 511, 1 N. W. 170; *San Francisco Bridge Co. v. Dumbarton L. Co.*, 119 Cal. 272, 51 Pac. 335; *Guerini Stone Co. v. Carlin Cons. Co.*, 248 U. S. 334, 63 L. Ed. 275; *Canal Co. v. Gordon*, 6 Wall. (U. S.) 561; *Dyer v. Irrig. Dist.*, 25 Wash. 80, 64 Pac. 1009; *Greenlee County v. Cotey*, 14 Ariz. 542, 155 Pac. 302.

² *Guerini Stone Co. v. Carlin Cons. Co.*, *supra*.

for advance payments is a condition precedent to the obligation of the contractor to continue with the work.¹ A contractor's remedies are twofold. He may stop work, repudiate the contract and recover the contract price for the work done or he may continue to work and sue for the past due installment.² No good reason exists for limiting the contractor upon a breach to the contract prices unless they are made to control. He should have the reasonable value of work done up to the time of the breach.³ But the breach may be waived and is waived if not availed of at the time of the breach. By proceeding with the work the contractor waives the damage which he suffers.⁴ Where of course the stipulation for payment is treated as a subsidiary or unsubstantial term of the contract it is declared that the failure to pay is not sufficient ground for abandonment, but that the sole remedy is an action for damages for breach of the covenant. How this term of the contract can be regarded as other than substantial is difficult of conception. If the contract provides for the issue of a certificate by the engineer before an installment payment shall be due, this is a condition precedent unless it is withheld fraudulently, arbitrarily or unreasonably.⁵ Where the public body has thirty days by express charter provision to pay all claims presented to it, a delay for that time after presentation of claim will not justify an abandonment by the contractor or constitute a breach of the contract.⁶ And where a contractor has

¹ *Guerini Stone Co. v. Carlin Cons. Co.*, *supra*; *Canal Co. v. Gordon*, *supra*.

² *Mechanics Bank v. New York*, 164 N. Y. App. Div. 128; *Cranford Co. v. New York*, 150 N. Y. App. Div. 195; *County of Christian v. Overholt*, 18 Ill. 223.

³ *Greenlee County v. Cotey*, *supra*.

⁴ *Mechanics Bk. v. New York*, *supra*.

⁵ *Devlin v. New York*, *supra*.

⁶ *Cranford Co. v. New York*, 150 N. Y. App. Div. 195, 211 N. Y. 534, 105 N. E. 1082.

accepted several previous payments, which were delayed, apparently without any protest, this establishes a course of dealing indicating that a reasonable delay was recognized as an incident of payment and a contractor may not depart from acquiescence in such a course of dealing unless he gives reasonable notice of his intention so to do.¹ In some jurisdictions the payment of installments is not considered a condition precedent to further performance, unless made so by express provision of the contract.² And where the contract is entire the failure to make a payment because the work is not progressing in accordance with the contract is justified, and the failure to pay can in no sense be considered a breach. In other words, a contractor cannot claim a default for failure to pay while he is likewise in default under the contract.³ Where under a contract to furnish coal the engineer issues his certificates showing payments to be due and the public body fails to make the payments, the estimates and certificates are conclusive upon the parties; and the contractor for failure to pay may claim a breach, and give notice of election to terminate the contract and sue for the amounts due for the deliveries, together with interest and the amount of percentage retained.⁴ Some cases attempt to draw a distinction between the effect of a default in payment of an installment when it becomes due arising from mere temporary inability and a deliberate refusal to pay. They recognize that the former may be a breach which will justify a contractor in abandoning the work and recovering for what has been performed, but they assert that he

¹ Cranford Co. v. New York, *supra*; Williams v. New York, 130 N. Y. App. Div. 182.

² County of Christian v. Overholt, *supra*.

³ National Cont. Co. v. Comm., 183 Mass. 89, 66 N. E. 639.

⁴ Price v. New York, *supra*.

will not be entitled to prospective profits. These authorities agree that mere delay in paying installments may be so inexcusable or unreasonable or may point to such an utter inability to perform as to be equivalent to a refusal to perform. They then declare, in such a case, as in the case of a deliberate refusal to pay, he may recover prospective profits. This reasoning seems to be based upon a supposed difference in the obligation to pay under a public contract from that under a private contract. They contend that a contractor who deals with a public body must not look for the same promptitude in payment as if he had a private contract, that he must expect occasional delays and inconvenience.¹ There can be no just foundation for such a distinction. A contractor who receives the obligation of a public body should not be compelled to finance the work. He has no right to assume an implied privilege in a public contract to commit breaches of the obligation to pay. The obligation to pay is just as binding in one kind of a contract as in another unless it is waived, and no good reason exists for creating an exception in favor of public contracts. A contractor has a right to rely upon the expressed obligation, and if the public body fails to provide in its contract against delay in payment no different rule should exist in its favor. When there is a failure to make periodical payments provided, if the contractor does not elect to treat such failure as a breach, but continues with the work and disregards the breach so far as it might excuse him from further performance, he waives it and may not later assert it as a breach when the public body annuls the contract.²

¹ Jones v. New York, 47 N. Y. App. Div. 39.

² Farrelly v. U. S., 159 Fed. 671.

§ 303. Breach During Performance—Refusal to Accept Goods.

Where the public body refuses to accept goods which are tendered under a contract, the contractor cannot keep them until the price falls or if they are perishable until they are damaged and then charge the loss. He must dispose of them within a reasonable time after the breach. He may elect to keep them as his own in which event he can recover the difference between the contract price and the market price at the time of the breach. Or he may elect to sell them. In this latter case he must sell them within a reasonable time, giving notice of his intention so to do to the public body, and he can then recover the difference between the contract price and the selling price of the goods.¹

§ 304. Renunciation—Anticipatory Breach.

The positive refusal to perform a contract is a breach of it, although the time for performance has not arrived, and liability for the breach at once occurs.² The measure of damages for such a breach is the difference between the contract price and the cost of performance.³ In a mutually executory contract, if before the time for performance has arrived on his part, one of the parties notifies the other that he will not perform it, the other party is free to consider himself absolved from all obligation to perform the agreement. He may sue at once for

¹ *Hughes v. U. S.*, 4 Ct. Cl. 64; *Friedenstein v. U. S.*, 35 Ct. Cl. 1; *Guy v. U. S.*, 25 Ct. Cl. 61; *Grover v. U. S.*, 5 Ct. Cl. 427, 3 Ct. Cl. 404.

² *U. S. v. Purcell Envelope Co.*, 249 U. S. 313, 63 L. Ed. 620; *Roehm v. Horst*, 178 U. S. 1, 44 L. Ed. 953, aff'g 91 Fed. 345; *Bridgeport v. Ætna Indem. Co.*, 91 Conn. 197, 99 Atl. 566; *Washington County v. Williams*, 111 Fed. 801; *Hayes v. Nashville*, 80 Fed. 641.

³ *U. S. v. Purcell Env. Co.*, *supra*; *U. S. v. Behan*, 110 U. S. 338, 28 L. Ed. 168.

all damages occasioned by the anticipatory breach, or if he so elects he may treat the declaration as brutum fulmen and wait for the time of performance to arrive, treating the contract in the meantime as binding. This rule has its limitations. It only applies to contracts which are mutually executory, such as in the case of public contracts, those for the performance of work, labor and services and for the sale and delivery of material and supplies. It will not apply to money contracts purely where one party has fully performed his undertaking, and there only remains the obligation of the other side to pay a certain sum of money at a stated time or times.¹ Nor can it apply to even a contract for services or labor which have been fully performed on one side and there remains only payment therefor. There can be no repudiation or abandonment of a contract by a party who has fully performed it.

If a contractor is to manufacture goods or fabricate or improve building material, and during the process of manufacture or improvement, the contract is repudiated, he is not bound to complete the manufacture or continue the improving of material, and estimate his damages by the difference between the market price and the contract price, but the measure of his damages is the difference between the contract price and the cost of performance.² In order to give effect to a renunciation it must operate to breach the entire contract or a covenant going to the whole consideration and therefore become a total breach.³

¹ *Washington County v. Williams, supra.* See *Hayes v. Nashville, supra;* (really a case of services with indemnity deposit for breach).

² *U. S. v. Purcell Env. Co., supra;* *Hinckley v. Pittsburgh B. S. Co.,* 121 U. S. 264, 30 L. Ed. 967; *Masterson v. Brooklyn,* 7 Hill, 61.

³ *Bridgeport v. Aetna Indem. Co., supra.*

§ 305. The Same—Remedies.

Where one party repudiates a contract and refuses longer to be bound by it, the injured party has an election to pursue either of three remedies: He may treat the contract as rescinded, and recover on quantum meruit so far as he has performed; or he may keep the contract alive for the benefit of both parties, being at all times himself ready and able to perform, and at the end of the time specified in the contract for performance, sue and recover under the contract; or he may treat the repudiation as putting an end to the contract for all purposes of performance, and sue for the profits he would have realized if he had not been prevented from performing. In the last case the contract would be continued in force for that purpose. Where, however, the injured party elects to keep the contract in force for the purpose of recovering future profits, treating the contract as repudiated by the other party, in order to eventuate such recovery the party suing must allege and prove performance on his part, or a legal excuse for non-performance.¹ For, ordinarily, upon rescission of a contract the recovery is limited to the value of the work and services and materials furnished, and damages for the breach, since the loss of expenditures or of profits are not allowable. Prospective profits are recoverable only where the contractor is prevented from going on, either by some affirmative act of the public body, as being ordered to desist from further work, or by the omission to perform some condition precedent to the further prosecution, as to do or furnish something necessary to its further progress.² While these general rules

¹ *Lake Shore & M. S. R. Co. v. Richards*, 152 Ill. 59, 38 N. E. 773.

² *U. S. v. Behan*, 110 U. S. 338, 28 L. Ed. 168; *Lake Shore & M. S. R. Co. v. Richards*, *supra*.

apply it is clear upon principle and authority and the rule is almost universally recognized that where one party to an executory contract refuses to treat it as subsisting and binding upon him, or by his act and conduct shows that he has renounced it and no longer considers himself bound by it, there is, in legal effect, a prevention of performance by the other party.¹ There must not necessarily be physical prevention. Any acts, conduct or declarations evincing a clear intention to repudiate the contract, and to treat it as no longer binding, are a legal prevention of performance by the other party.² And it can make no difference whether the contract has been partially performed, or the time for performance has not yet arrived; nor is it important whether the renunciation be by declaration of the party that he will no longer be bound, or by acts and conduct which clearly evince that the determination has been reached and is being acted upon. The mere declaration of the party of an intention not to be bound, or acts and conduct in repudiation of the contract will not, of themselves, amount to a breach so as to create an effectual renunciation of the contract; for one party cannot, by any act or declaration, destroy the binding force and efficacy of a contract. It gives, however, to the other party the right to elect to treat it as *brutum fulmen* or as a final assertion of his adversary not to be bound longer by the contract, and a wrongful renunciation of the contractual obligations. In event of the latter election, it becomes a breach and he can recover upon it as such.³ Upon election to treat the renunciation, whether by declaration or acts and conduct as a breach of the contract, the rights of the parties are then fixed and the

¹ *Christian County v. Overholt*, 18 Ill. 223.

² *Lake Shore & M. S. R. Co. v. Richards*, *supra*.

³ *Idem*.

contract relation ceases to exist, except for the purpose of maintaining an action for the recovery of damages. Anticipatory breach thus gives rise to an immediate cause of action, even though, as that term implies, the time for performance has not arrived.¹ Even upon grounds of convenience or expediency, which of course however just or equitable cannot be made the basis of judicial decision, such a rule commends itself. For it is inequitable and without purpose to require one party to continue to perform, notwithstanding repudiation by the other. The damages are greatly enhanced and the injured party always has the hazard of his adversary's insolvency. It is more reasonable and just, upon a repudiation by one party, to permit the other party to cease performance, stop expenditure, and thus curtail damages, and to allow recovery once for all of the damages that the injured party will sustain through non-performance by the other; the *locus pœnitentiæ* being kept open until the injured party elects to treat the contract as abandoned by the other and brings suit as for non-performance.²

§ 306. The Same—Failure to Make Installment Delivery or Payment Under a Contract.

Not every refusal or omission of one party to do something which he ought to do will justify the other in repudiating the contract. There must be an absolute refusal to perform his part of the contract. It is a clearly recognized principle that if there is only a partial failure of performance by one party for which there may be compensation in damages the contract is not ended. There is no absolute rule which can be laid down in express terms

¹ *Lake Shore & M. S. R. Co. v. Richards, supra*; *U. S. v. Purcell Envelope Co.*, 249 U. S. 313, 63 L. Ed. 620.

² *Lake Shore & M. S. R. Co. v. Richards, supra*.

as to when a breach of contract on one side exonerates the other from performance of his part of the contract. Where a contract is for delivery of goods in installments and installment payments are provided for, parties often treat a refusal to pay as a breach and abandonment of the contract and decline to deliver more. And where one installment of deliveries is not made, the party bound to receive deliveries refuses to receive any subsequent installments asserting a breach and termination of the contract from failure to deliver one installment. The rights of the parties arising from such acts and conduct are not easy of adjustment and decision, and each case is to be determined from the particular circumstances involved. Clearly if one party states that he will not pay for any of the deliveries, such would be a total breach and the seller would be no longer bound to deliver. Whether mere non-payment on one hand or non-delivery on the other will amount to a repudiation or abandonment of the contract which will justify a termination of the contract by the other party, depends on whether such act evinces an intention to wholly abandon the contract, to no longer be bound by it and set the other party free, and this is usually a question of fact to be answered by a jury. Non-delivery of a single installment will not necessarily intimate that the party not delivering does not intend to be any longer bound, but in particular contracts and under particular circumstances it might be sufficient. The same is true of non-payment. A single failure to make an installment payment is of itself not necessarily evidence of an intention no longer to be bound by the contract, but other circumstances would justify a court in drawing such inference even from a single failure to pay one installment. Ordinarily defaults by one in making particular payments,

deliveries or acceptances of deliveries will not release the other party from his duty to make the other deliveries or payments or acceptances stipulated in the contract unless the conduct of the party in default evinces an intention to abandon the contract, or a design no longer to be bound by its terms. The reason for the rule is that a party complaining of a breach under the circumstances should be required to rely upon the normal principle of compensation to recompense him and not be permitted to reap the abnormal advantage which might come to him, by reason of changes in market conditions, from an option to rescind or repudiate the bargain. In the absence of any expression of intention in such a contract, it will be deemed that a contract for the sale of goods by successive deliveries is severable, and the failure to accept or deliver one installment will not entitle the other party to refuse delivery or acceptance of the installments that remain. Parties may by appropriate language make each delivery, or each installment of payment, a condition precedent to further continuance of the contract. In such a case the contract might properly be terminated by the party aggrieved. In like manner if by the non-delivery of part of the goods contracted for the whole object of the contract is defeated, the party making default renounces on his part all the obligations of the contract. Where the question arises as to whether the non-delivery or the non-payment amounts to an abandonment of the contract or a refusal to perform it by the person in default and whether the acts and conduct of the parties evince an intention no longer to be bound by it, questions of ability, solvency and intention enter into its determination by a jury. Sometimes the act of terminating a contract by the one injured by default in non-delivery or non-payment is spoken of as a

rescission, but a rescission of a contract, strictly speaking, can only be accomplished by the mutual agreement of the parties. Such termination is rather to be viewed as the right of one party to treat a wrongful repudiation of the contract by the other party as a complete renunciation of it. See note *Infra*.

§ 307. Renunciation of Continuing Contract.

Where a continuing contract has not been fully performed on either side, the repudiation of the contract by one party, or his refusal of further performance, will authorize the other party to treat the contract as at an end, and will give to the latter a right of action for damages for its breach. The injured party will not be confined to the contract price for work done and materials received under the contract but may recover the entire damages resulting from the breach in terminating the contract. The innocent party if he be the contractor is not bound to go on manufacturing, or improving material for the work as a condition precedent to obtaining the proper relief, and depend upon getting the difference between the market value and the contract price. He may do this at the risk of finding no market for it, or of being unable to collect the amount that might become due. The law is not so unreasonable. He has the right to treat the re-

NOTE.—No decisions involving public contracts have been found directly on the questions here considered and no citations therefore are available. For cases arising between private individuals involving the questions, see *Norrington v. Wright*, 115 U. S. 188, 29 L. Ed. 366; *U. S. v. Smoot*, 82 U. S. (15 Wall.) 36, 21 L. Ed. 107; *Lake Shore & M. S. R. Co. v. Richards*, 152 Ill. 59; *West v. Bechtel*, 125 Mich. 144, 84 N. W. 69; *Gerli v. Poidebard Silk Mfg. Co.*, 57 N. J. L. 432, 31 Atl. 401; *Blackburn v. Reilly*, 47 N. J. L. 290, 1 Atl. 27, 54 Am. Rep. 159. See English cases cited in American cases.

The rule in New York has been to the effect that non-delivery of a single installment was ground for rescission. This rule has been superseded by the Personal Property Law, § 126, and even the sale of water by a municipality is a sale within this statute.

pudiation as a total breach of an entire contract, and to sue immediately and recover at one time all the damages resulting from it, without waiting for the time for full performance, to elapse.¹ If one party voluntarily disables himself or puts it out of his power to perform before the time of performance arrives or further perform during the time of performance, the other party has an immediate right of action for all damages occasioned by this breach.² The same result is reached where a party prevents performance by the other, and the injured party is entitled to a recovery based upon the same measure of damages.³

§ 308. Performance—Breach—Abandonment—When Justified.

In these instances of breach of contract which have been adverted to in the foregoing sections, it is pointed out that a breach of contract gives the party injured by it the privilege of refusing to further proceed and of abandoning the contract. A breach which will justify abandonment must be of a material term of the contract, one which the parties looked upon as a condition precedent to further continuance of performance. It must go to the substance of the contract. Not every act or omission of a party will permit the other party to repudiate and end the contract. Breaches of this character amounting to a partial failure of

¹ *Masterson v. Brooklyn*, 7 Hill, 61; *Clark v. Mayor*, 4 N. Y. 338; *Jones v. Judd*, 4 N. Y. 411; *Devlin v. Mayor*, 63 N. Y. 8; *Lord v. Thomas*, 64 N. Y. 107; *Royalton v. Royalton & W. T. Co.*, 14 Vt. 311; *Seaton v. Second Municipality*, 3 La. Ann. 45; *Chicago v. Tilley*, 103 U. S. 146, 26 L. Ed. 371.

² *Bridgeport v. Ætna Indem. Co.*, 91 Conn. 197, 99 Atl. 566; *Beckwith v. New York*, 121 N. Y. App. Div. 462; *Masterson v. Hill*, *supra*; *James v. Allen County*, 44 Ohio St. 226, 6 N. E. 246; *Royalton v. Royalton & Co. T. Co.*, 14 Vt. 311; *Gilman v. Lamson County*, 234 Fed. 507; *U. S. v. Purcell Envelope Co.*, 249 U. S. 313, 63 L. Ed. 620.

³ *Long Island Cont. & S. Co. v. New York*, 204 N. Y. 73, 97 N. E. 483; *Lord v. Thomas*, 64 N. Y. 107; *Parr v. Vil. of Greenbush*, 112 N. Y. 246; *Danolds v. State*, 89 N. Y. 36.

performance and relating to covenants and stipulations of the contract which are not in the nature of conditions precedent are to be compensated in damages for which an action may be brought. But if the breach goes to the substance of the contract, an abandonment is justified and immediate suit may be brought for the entire damage.¹ Not every unfounded or illegal claim a party may make during the prosecution of a large contract will justify the other in abandoning the contract as for a breach.

If claims are made under rights reserved by the contract and these are untenable and erroneous, there is nevertheless a *locus pœnitentiæ*, some reasonable time allowed to a party making such a claim to become aware that he is in error and recede from his position. It is only where he shows an unwillingness to carry out his contract or such reasonable time elapses and his erroneous attitude is not changed that abandonment is justified.² A slight or partial neglect to observe some of the terms or conditions of a contract will not justify a rescission or abandonment.³ In cases where abandonment occurs and the contract is terminated, although the injured party declares that he has annulled or cancelled the contract, this will not have the technical effect of a rescission and release each party from every obligation of the contract as if it had never been made. There is a mode of abandoning a contract as a live and enforceable obligation, which still entitles the party

¹ *U. S. v. Behan*, 110 U. S. 338, 28 L. Ed. 168; *U. S. v. Purcell Env. Co.*, 249 U. S. 313, 63 L. Ed. 620; *Guerini Stone Co. v. Carlin Cons. Co.*, 248 U. S. 334, 63 L. Ed. 275; *Greenlee County v. Cotey*, 17 Ariz. 542, 155 Pac. 302; *Peet v. East Grand Forks*, 101 Minn. 518, 112 N. W. 1003; *Long Island Cont. & S. Co. v. New York*, 204 N. Y. 73, 97 N. E. 483; *Elgin v. Joslyn*, 136 Ill. 525, 26 N. E. 1090.

² *National Cont. Co. v. Hudson Riv. W. P. Co.*, 192 N. Y. 209, 84 N. E. 965.

³ *Elgin v. Joslyn*, *supra*.

declaring its abandonment to look to the contract to determine the damages to which he is entitled under it for the breach which gave him the right of abandonment.¹ A notice of annulment under the circumstances means simply that the public body will proceed no further with the contractor under the contract, not that the contract is rescinded or avoided. The obligations of the contract, so far as they apply to a default, remain in full vigor. The public body has the right, unless some other measure of damage is provided, to let the work of completion to another contractor and to charge the original contractor with the reasonable difference in cost.²

§ 309. Executory Contract—Making New and Modified Contract—Consideration.

When a party to an executory contract breaches it by refusing to perform except upon the payment of additional compensation, it is optional with the adverse party to sue him for damages, or waive the breach, treat the contract as abrogated and enter into a new contract with the defaulting party. If the innocent party elects not to hold him answerable in damage but because of the importance to him that the work should be done makes a new contract, he cannot be heard to say that it is without consideration. The abandonment of the old contract and the making of the new promises, one for the other in the new contract, constitute a sufficient consideration. The mutual releases from the obligations of the original agreement also furnish a basis to support the new contract. If, therefore, in the new agreement the innocent party in order to derive the

¹ *Hayes v. Nashville*, 80 Fed. 641; *U. S. v. McMullen*, 222 U. S. 460, 56 L. Ed. 269.

² *U. S. v. McMullen*, 222 U. S. 460, 56 L. Ed. 269; *U. S. v. O'Brien*, 220 U. S. 321, 55 L. Ed. 481, aff'g 163 Fed. 1022.

benefits of performance makes new and additional promises to the defaulting party, and he in consideration of the promises completes the work, the promises will bind.¹

§ 310. Effect of Breach.

When a contractor abandons a public construction or building contract or even a contract for personal service without excuse or justification, the general rule is that where the contract is entire, and contracts of this character are usually regarded as entire, there can be no recovery.² Even if there has been a substantial performance by the contractor where the abandonment is willful, or there has been a willful and intentional deviation from the terms of the contract, the contractor is without remedy.³ For a substantial compliance resulting from a bona fide intention to perform the contract, the contractor is permitted to bring an action and may have the contract price less a deduction for the value of the part unfinished. Neither is the public body liable for partial performance of a contract unless it accepts the benefits of such partial performance. This, however, means an intentional acceptance from which would arise an implied promise to pay for the value of such benefits. The acceptance rule cannot be held to apply to those cases where a public body is forced to accept the benefits, as where its bridge is repaired or its land or streets are improved and it is impossible to return what has been received. There must be a voluntary retention of the benefits.⁴

¹ *Long v. Pierce County*, 22 Wash. 330, 61 Pac. 142; *Dyer v. Middle Kittitas Irrig. Dist.*, 25 Wash. 94, 64 Pac. 1009; *Peet v. East Grand Forks*, 101 Minn. 518, 112 N. W. 1003; *Bader v. New York*, 51 Misc. 358. See *Admiral Realty Co. v. New York*, 206 N. Y. 110, 99 N. E. 241. See § § 97, 165, *ante*.

² *Poynter v. U. S.*, 41 Ct. Cl. 443; *Clark v. Sch. Dist.*, 29 Vt. 217.

³ *Dermott v. Jones*, 2 Wall. (U. S.) 1, 17 L. Ed. 762.

⁴ *Douglas v. Lowell*, 194 Mass. 268, 80 N. E. 510.

Sometimes the further completion of the work and making use of the abandoned work will give rise to an action on quantum meruit, but not where the cost of completion exceeds what was due.¹

§ 311. The Same—Willful Breach.

On the other hand, the willful or intentional breach of the contract by the public body of its contract affords the contractor the right to a recovery of the value of his contract. Where the breach consists in preventing the performance of the contract, without fault of the other party who is willing to perform it, the contractor may recover what he has already expended towards performance, together with the profits which he would realize had he been allowed to perform.²

Of course, when the party injured by the stoppage of a contract elects to rescind it, then he cannot recover any damages for a breach of the contract, either for outlay or for loss of profits. The recovery is then for the value of his services actually performed as upon a quantum meruit and no question of losses or of profits enters into it.³

Where the contractor voluntarily and willfully fails to complete a work or structure to be done under a special contract for an entire sum, he is without any remedy. This rule applies even in the case of a willful default in the performance of a stipulation or covenant not going to the essence of the contract. Any recovery permitted is restricted to an honest and bona fide intention to follow the

¹ Winamac Sch. Dist. *v.* Hess, 151 Ind. 229, 50 N. E. 81.

² U. S. *v.* Behan, 110 U. S. 338, 28 L. Ed. 168; Clark *v.* Mayor, 4 N. Y. 338; Devlin *v.* New York, 63 N. Y. 8; Long Island Cont. & S. Co. *v.* New York, 204 N. Y. 73, 97 N. E. 483; Cranford Co. *v.* New York, 150 N. Y. App. Div. 195, 211 N. Y. 534, 105 N. E. 1082.

³ U. S. *v.* Behan, *supra*; Clark *v.* Mayor, 4 N. Y. 338. But see Carlin *v.* New York, 132 N. Y. App. Div. 90.

contract. Contractors have no right to break contracts and claim the contract price. Where the failure to perform is intentional it is such bad faith as admits of no recovery.¹

Where a contract is to erect a building for an entire sum to be paid in installments as the work progresses, where the contractor *willfully* refuses to complete, this entitles the public body to a repayment of all installments received by the contractor. Interest may be allowed on the installments from the time when under the contract the work should have been completed, and this rule as to interest is not affected by a delay in bringing suit.² But the question as to whether there has been willful and intentional failure to perform a contract is usually a question of fact³ although under some circumstances it might be resolved as a question of law. A refusal to install ventilators in a school building is not wilful and intentional as matter of law, were a contractor first figured the cost from a picture of the school building which did not show them, and where, when he was shown plans and specifications which included them he stated that he had not figured on them and was told by a trustee who principally had charge of the erection that he might omit them. A jury would be justified in finding that he omitted them in good faith and that their absence was not a structural defect rendering the building less substantial, since they could easily be supplied after the building was erected.⁴ But if the contract is divisible, the voluntary abandonment of it will not preclude a recovery for so much as has been performed less such

¹ *Bonesteel v. Mayor*, 22 N. Y. 162; *Tompkins v. Dudley*, 25 N. Y. 272; *Homer v. Shaw*, 177 Mass. 1, 58 N. E. 160; *Homer v. Shaw*, 212 Mass. 113, 98 N. E. 697.

² *U. S. v. U. S. F. & G. Co.*, 236 U. S. 512, 59 L. Ed. 696; *Tompkins v. Dudley*, *supra*.

³ *Smith v. Russell*, 140 N. Y. App. Div. 102.

⁴ *Idem*.

damages as the other party suffers from the breach which he may justly counterclaim.

§ 312. Rescission for Breach.

The right to rescind a contract is an extreme right, and its exercise will not be warranted by every breach. The existence of the right cannot, however, be denied or its exercise refused where a contract is entire, and is broken by either party in matter of time or in the manner of performance from the inception of carrying it out.¹ But where the contract is divisible or is made up of several distinct and similar acts to be separately and successively performed, the right to rescind depends upon whether the conduct of the party in default shows an intention to abandon or no longer be bound by the contract. And the failure to perform must be of such a character that it defeats the very object of the contract.

A slight or partial neglect to follow some term or condition will not justify rescission.²

§ 313. Prevention of Performance—Direction to Discontinue Work.

A contractor cannot compel a public body to continue in the work of construction of a building or other structures. A public body, just as an individual may abandon an enterprise which it has undertaken and refuse to allow a contractor to proceed; it may make a new contract or complete the work itself without there being any default on the part of the contractor. But while it is free to violate the contract, while it may refuse to perform or arrest performance it can in no way destroy or get rid of the obligation of the contract. The original contractor has

¹ *Norrington v. Wright*, 115 U. S. 188, 29 L. Ed. 366, aff'g 5 Fed. 768.

² *Elgin v. Joslyn*, 136 Ill. 525, 26 N. E. 1090.

his claim for damages which in the case of the State or nation the legislature or Congress would doubtless recognize or in those instances where the right to sue has been conferred, the contractor may sue and recover his damages including prospective profits where the public body prevents performance.¹ While the contract is executory, a public body has the power to stop performance on the other side by an explicit direction to that effect, subjecting itself to such damages as will compensate the contractor for being stopped in the performance on his part at that particular stage of the work. The party thus forbidden cannot go on afterwards and increase the damage. In such case the just claims of the contractor are satisfied when he is fully recompensed for his part performance and indemnified for his loss in respect to the part left unexecuted. The refusal to permit further performance is not a rescission of the contract, but simply a breach for which in an appropriate action he is entitled to recover these damages.²

Where the contract is partly performed and the contractor is prevented from completing the remainder, the contractor is entitled to the contract price for the part which he has performed in accordance with the contract rate, and he is entitled to damages for being prevented from completing the remainder of the contract.³ Consequently

¹ *Lord v. Thomas*, 64 N. Y. 107; *Danolds v. State*, 89 N. Y. 36, 42 Am. Rep. 277; *Parr v. Greenbush*, 112 N. Y. 246, 19 N. E. 684.

² *Nebraska City v. Nebraska City G. L. & C. Co.*, 9 Neb. 339, 2 N. W. 870.

³ *Cranford Co. v. New York*, 150 N. Y. App. Div. 195, 211 N. Y. 534, 105 N. E. 1082; *Kehoe v. Rutherford*, 56 N. J. L. 23, 27 Atl. 912; *Harrison v. Clarke*, 78 N. J. L. 236, 73 Atl. 43; *Kenwood Bridge Co. v. Dunderdale*, 50 Ill. App. 581; *Rittenhouse v. Baltimore*, 25 Md. 336, *Clark v. New York*, 4 N. Y. 338, 53 Am. Dec. 379; *Guerini Stone Co. v. Carlin Cons. Co.*, 240 U. S. 264, 60 L. Ed. 636; *United States v. Behan*, 110 U. S. 338, 28 L. Ed. 168; *U. S. v. Smith*, 94 U. S. 214, 24 L. Ed. 115, aff'g 11 Ct. Cl. 707; *Kellogg B. Co. v. U. S.*, 15 Ct. Cl. 206; *Ferris v. U. S.*, 28 Ct. Cl. 332; *Harvey v. U. S.*, 8 Ct. Cl. 501. See *Carlin v. New York*, 132 N. Y. App. Div. 90.

the items which chiefly make up this loss, the outlays which were reasonably made in preparing for performance and the expected profits which were to be gained from performance, are elements of damage and are recoverable as such.¹ In addition to these chief items of loss he may recover such other items as are included in his special loss. For instance, he may recover a fair allowance for his own time,² and where he has brought material to the site or has it on hand for the contract, he may have any loss that has resulted to him thereon. Where the expense connected with getting ready to perform is about the same as actual performance, he may recover from the public body the contract price.³

§ 314. Stopping Work Because of Dissatisfaction with Progress.

Where a public contract provides that if the engineer shall be of the opinion and shall so certify in writing to the public body or officer, that the performance of the contract is unnecessarily or unreasonably delayed, the contract may be cancelled, this does not confer upon the engineer the right to cancel it at his option.⁴ The matter is one of discretion, and the discretion is one which depends upon his honest judgment. If, therefore, he forms his opinion, capriciously or arbitrarily without regard to the facts, his

¹ *Beattie v. N. Y., etc., Cons. Co.*, 196 N. Y. 346, 89 N. E. 831; *Long Island Cont. Co. v. New York*, 204 N. Y. 73, 97 N. E. 483; *Danolds v. State*, 89 N. Y. 36, 42 Am. Rep. 277; *Dailey v. New York*, 170 N. Y. App. Div. 267, 218 N. Y. 665, 113 N. E. 1053; *Beckwith v. New York*, 121 N. Y. App. Div. 462; *U. S. v. Behan*, *supra*; *Guerini Stone Co. v. Carlin Cons. Co.*, *supra*; *Houston Cons. Co. v. U. S.*, 38 Ct. Cl. 724; *Ferris v. U. S.*, 28 Ct. Cl. 332.

² *U. S. v. Behan*, *supra*; *Houston Cons. Co. v. U. S.*, *supra*; *Taylor v. Spencer*, 75 Kan. 152, 88 Pac. 544.

³ *Hardy v. U. S.*, 9 Ct. Cl. 244.

⁴ *Wakefield Cons. Co. v. New York*, 157 N. Y. App. Div. 535, 213 N. Y. 633, 107 N. E. 1087; *Smith Cont. Co. v. New York*, 167 N. Y. App. Div. 263.

certificate is not made in good faith, and is not binding or conclusive.¹ The contractor is then entitled to show the facts and have a determination by a jury as to whether there are any facts upon which the judgment of the engineer could be based, or where he relies upon the reports of subordinates or others, whether the facts are misrepresented to him.² If reports to him are untrue or inadequate, and he relies upon them without personal investigation, no matter how implicitly he believes them, his certificate cannot be conclusive.³ When only one-fifth of the contract time has expired, most of it during a severe winter, and a considerable amount of work has been actually performed and no facts are shown which justify the engineer's conclusion, but it appears that the real reason is not that the contractor has failed to proceed with due diligence down to the time of termination, but rather that he was not ready to prosecute the work with sufficient speed when the contract was terminated, the jury may find that the opinion was arbitrary and not based upon an honest consideration of the facts.⁴ The contractor cannot be deprived of the opportunity to complete his contract until the conditions provided by contract for cancellation are fulfilled.⁵ If the right to terminate the contract is reserved to be exercised in case of delay, and it merely authorizes the public body in the event the contractor failed to complete any one section of the work to discontinue such work and employ others to do that work, this clause does not

¹ Wakefield Cons. Co. v. New York, *supra*; Smith Cont. Co. v. New York, *supra*.

² Wakefield Cons. Co. v. New York, *supra*; Smith Cont. Co. v. New York, *supra*.

³ Wakefield Cons. Co. v. New York, *supra*; Smith Cont. Co. v. New York, *supra*.

⁴ Wakefield Cons. Co. v. New York, *supra*.

⁵ *Idem*.

contemplate an entire abrogation of the contract as the contractor is still entitled to the contract price less the amount expended to complete a particular part suspended.¹ When the entire contract is improperly abrogated, whether the occasion is that no sufficient basis for its termination exists or no power exists to terminate it entirely, the contractor is entitled to recover his damages as for a breach of the contract.² Where the sole material express promise is to complete work by a certain date, if then completed the public body has no concern with intermediate delays. These clauses reserving the right to annul do not, however, import a promise to exercise such diligence as will satisfy the engineer. It is one thing to reserve the right to let further continuance of a contract depend upon the judgment of the engineer; it is quite another to make his dissatisfaction with the progress to be conclusive of a breach. When, therefore, the contractor had sufficient time left in which to complete when he was turned away from the work and the contractor might have completed in time, the contract cannot be said to be breached so as to allow the public body to recover the difference in cost of completion.³ When the contract provides for approval by a higher officer of the decision of annulment by a resident engineer, yet if upon annulment the contractor refuses to go on, there is no need of performing the useless ceremony of obtaining such approval and the contractor may not avail himself of it when sued for a breach of contract based upon his refusal.⁴

¹ *Cody v. New York*, 71 N. Y. App. Div. 54; *Wakefield Cons. Co. v. New York*, *supra*; *Smith Cont. Co. v. New York*, *supra*.

² *U. S. v. O'Brien*, 220 U. S. 321, 55 L. Ed. 481, aff'g 163 Fed. 1022.

³ *Wakefield Cons. Co. v. New York*, *supra*.

⁴ *Graham v. U. S.*, 231 U. S. 474, 58 L. Ed. 319, aff'g 188 Fed. 651.

§ 315. Abandonment.

The obligation of performance on one side of a contract is as strong as a similar obligation on the other side. The duty is mutual and reciprocal. Whether the obligation is to deliver goods within a certain time, or perform work to the satisfaction of the public body, there is a like duty to receive the goods when delivered, or to show why work, which a contractor claims has been completed, is not satisfactory.¹

When goods under a contract are tendered and refused during the life of the contract, the contractor is not bound to deliver after the contract has expired. If he does, however, it will be at the contract price. If he fails to deliver or tender again it cannot be said he has abandoned his contract.² So if he leaves his plant on the work this is equivalent to a tender of readiness to perform any further work that might be required, and it becomes the duty of public officers to point out what omissions or defects exist. If they fail to do this, after a reasonable time he can remove his plant and claim that the public body is satisfied with his performance and recover accordingly.³ The agents of a public body may not lead him to understand that he has complied with the terms of his contract and later claim a reduction when it has become too late for him to remedy the situation.⁴

§ 316. Failure to Object or Take Advantage of Breach During Performance.

Where a contract is breached during performance the injured party must take advantage of it. If he fails to do

¹ *Gibbons v. U. S.*, 2 Ct. Cl. 421; *Kimball v. U. S.*, 24 Ct. Cl. 35. See § 308.

² *Gibbons v. U. S.*, *supra*.

³ *Kimball v. U. S.*, *supra*.

⁴ *Merrian v. U. S.*, 20 Ct. Cl. 290.

this he cannot later assert the breach.¹ If later the contract is rescinded or annulled he cannot set up the breach which he has waived.² If instead of claiming a forfeiture as a result of a breach, the public body rests upon a clause which enables it to go on and complete the work and charge the expense to the contractor, such action will prevent it from later insisting when the contractor sues for a claimed balance, that the contract was forfeited. The only remedy of the public is to counterclaim the cost of completing the work.³

§ 317. Conditions Precedent.

The breach of a contract by failure to fulfill a condition precedent will prevent any recovery by the dilatory party either on the contract or on quantum meruit. Such breach gives to the injured party the right to rescind the contract or treat it as broken and recover damages as for a total breach.⁴

But performance of even conditions precedent may be waived.⁵

§ 318. Performance—Covenants to Keep in Repair.

An unconditional express covenant to keep in repair is equivalent to a covenant to rebuild and it will bind the contractor to make good any injury which human power can remedy even if caused by storm, flood, fire, inevitable accident or even the act of a stranger.⁶ A covenant to

¹ *Farrelly v. U. S.*, 159 Fed. 671; *Mills Co. v. State*, 110 N. Y. App. Div. 843, 187 N. Y. 552; *Taylor v. New York*, 83 N. Y. 625; *Kennedy v. New York*, 99 N. Y. App. Div. 588; *York v. York Ry. Co.*, 229 Pa. St. 336, 78 Atl. 128.

² *Mills Co. v. State*, *supra*; *Farrelly v. U. S.*, *supra*.

³ *Taylor v. New York*, *supra*.

⁴ *Bridgeport v. Aetna Indemnity Co.*, 91 Conn. 197, 99 Atl. 566.

⁵ *Bradley v. McDonald*, 218 N. Y. 351, 113 N. E. 340; *Mayor v. Butler*, 1 Barb. 325.

⁶ *Meriwether v. Lowndes County*, 89 Ala. 362, 7 So. 198; *Riley v. Brooklyn*, 46 N. Y. 444; *Mitchell v. Hancock County*, 91 Miss. 414, 45 So. 571.

surrender leased premises at the expiration of the lease in the same condition as at its execution, allowing for reasonable use and wear and excepting damage by the elements, will not bind to restore the premises to their former condition. Whether damages flow from a reasonable use, keeping in mind the purposes of the lease, is a question for the jury.¹ Where there is a technical or implied surrender of the premises upon each renewal of the lease, such surrender will not be made to work injustice to the parties in hostility to their real intention. A surrender of the lease during its term and an acceptance by the public body will not extinguish rights of action already accrued, whether for damages or rent in arrears.² Of course acceptance of possession with full knowledge of the facts or full opportunity to know and without protest or claim of damage for breach or violation of covenants may constitute an admission of performance of the covenant and a waiver of any right of action.³

§ 319. Covenant to Renew Lease.

Covenants by a landlord for continual renewals of lease are not favored since they tend to create a perpetuity. They are nevertheless valid, if explicit. ⁴ When, therefore, a public body in executing a lease manifests an intention to bind itself to grant future renewals, and this intention is not left to conjecture or implication, but is clearly and specifically provided by the terms of the lease, a covenant for future renewals will be enforced.⁵

A general covenant in a lease to renew upon the same

¹ *McGregor v. Bd. of Education*, 107 N. Y. 511, 14 N. E. 420.

² *Idem.*

³ *Idem.*

⁴ *Burns v. New York*, 213 N. Y. 516, 108 N. E. 77; *Drake v. Board of Education*, 208 Mo. 540, 106 S. W. 650.

⁵ *Burns v. New York*, *supra*.

terms, conditions and agreements as contained in the original lease is not sufficient to show an intention to grant renewals in perpetuity. The covenant for renewal must contain language which shows an intention to include in renewal leases a particular covenant in regard to future renewals.¹ Such a covenant will bind the public body until the lands are required for public purposes.² The right to such renewals may be lost and the covenant for renewals waived by acts of the parties which amount to a practical construction of the covenant.³

§ 320. Money Due—Set-off.

Where a contractor is owed money by a public body for performance of one contract and he becomes liable to the public body in damages for breach of another contract the public body have the right to retain the money due under one contract and charge it as a set-off against such liability. While it might assert such liability in an action it is not essential. It may refuse to pay under one contract what it must eventually recover as damages for a breach of the other.⁴

¹ *Burns v. New York*, *supra*.

² *Burns v. New York*, *supra*; *Storms v. Manhattan Ry. Co.*, 178 N. Y. 493, 71 N. E. 3.

³ *Syms v. Mayor, etc.*, of New York, 105 N. Y. 153, 11 N. E. 369.

⁴ *Barry v. U. S.*, 229 U. S. 47; *Wilds v. Bd. of Education*, 227 N. Y. 211, 125 N. E. 89; *Modern Steel Structural Co. v. Van Buren*, 126 Iowa, 606, 102 N. W. 536.

CHAPTER XLVII

PERFORMANCE—NON-PERFORMANCE—COMPLETION BY PUBLIC BODY

§ 321. Completion by Public Body.

Where a contractor with a public body fails to complete an undertaking assumed by him, the right of the public body to complete the undertaking whether it be a building or other structure or work cannot be made to depend upon a provision of the contract authorizing completion, but rests upon the elemental ground that a party to a contract not broken through his fault is entitled to its benefits. And if an expenditure of money is necessary to protect and complete that which is already in the possession of the public body as a result of part performance, such expenditure may be made and recovery had for it.¹ The public body is entitled to the benefit of its bargain and to have the work or structure completed at no greater cost to it than the contract price.² But in endeavoring to fulfill the contract, the public body may not proceed in a reckless or extravagant manner and charge the contractor for expenses unreasonably or unnecessarily incurred.³ It is, however, entitled to the reasonable cost of the work necessarily done.⁴ But this includes the doing over again of work

¹ *Ludowici Caladon Co. v. Indep. Sch. Dist.*, 149 N. W. (Iowa) 845.

² *Ludowici Caladon Co. v. Indep. Sch. Dist.*, *supra*; *Ætna Iron Wks. v. Kossuth County*, 79 Iowa, 40, 44 N. W. 215.

³ *Mayor &c. of New York v. Second Ave. R. R. Co.*, 102 N. Y. 572, 7 N. E. 905; *Camden v. Ward*, 67 N. J. L. 558, 52 Atl. 392.

⁴ *Mayor &c. N. Y. v. Second Ave. R. R. Co.*, *supra*; *Powers v. Yonkers*, 114 N. Y. 145, 21 N. E. 132.

already done where necessary.¹ It is the duty of the public body to take all proper measures to diminish and reduce the quantum of damages.² It may deduct the cost of completion from any unpaid balance of the contract price.³ But the work of completion with which the contractor is to be charged must be the same work which he had agreed to perform.⁴ Where the public body voluntarily undertakes to raise a caisson, the property of the contractor, thereby saving to him the benefits of his contract, it can only charge against him what it would reasonably have cost to do such work.⁵ But while a public body may complete unfinished work at the expense of the contractor, it is not restricted to that remedy but may recover from the contractor or his surety the damages incurred.⁶

§ 322. The Same—Property in Materials.

When a contractor is to furnish materials and labor for the purpose of erecting a structure or work on premises of another, the materials are the property of the contractor until affixed to the land or are delivered to and accepted by him, and this rule is not altered by the fact that the materials were purchased with the intention of putting them into the structure or work or that they were brought upon the land of the public body, or that certain preliminary work had been done upon them in order to adapt them for annexation to the structure, or that they have been tentatively affixed to the structure or work for the

¹ *Powers v. Yonkers*, *supra*.

² *Rowe v. Peabody*, 207 Mass. 226, 93 N. E. 604.

³ *Powers v. Yonkers*, *supra*; *Jones v. New York*, 32 Misc. 211, 60 App. Div. 161, 174 N. Y. 517, 66 N. E. 1113; *Wells v. Bd. of Educ. West Bay City*, 78 Mich. 260, 44 N. W. 267; *McGowan v. U. S.*, 35 Ct. Cl. 606.

⁴ *U. S. v. Axman*, 234 U. S. 36, 58 L. Ed. 1198, aff'g 193 Fed. 644.

⁵ *Snare & Triest Co. v. U. S.*, 50 Ct. Cl. 370.

⁶ *U. S. v. U. S. Fidelity & G. Co.*, 236 U. S. 512, 59 L. Ed. 696.

purpose of seeing whether they would fit and afterwards removed or that the public body has made payments to the contractor as the work progressed.¹ Under this rule if a contractor abandons his work and leaves materials and appliances at the site and they are used by the public body in completing the work, the contractor may recover their value or the value of their use.² And under the same principle the contractor cannot compel the public body to use material left behind which the public body does not desire to use or accept.³ This is especially true where the contract creates liability only for material in place. When accordingly a surety of the contractor completes the work which had been stopped and possession taken by the public body and such surety uses material which had previously been rejected by the public body and sold under execution by the sheriff but which was still allowed to remain on the site by a purchaser and was there when the surety undertook the work, the public body had no interest in such material since it did not pass the inspection required by the contract, and the surety of the contractor acquired no rights in it and was liable for appropriating it.⁴

When a construction contract has been annulled and relet to a new contractor and the government retained certain property and material at the site, without the consent of its true owner, and turned it over to the new contractor, whom it advised that it would not be liable under any circumstances for the seizure of the property, no liability on the part of the government can arise. Where the govern-

¹ *Rochelle v. Evens & H. F. B. Co.*, 164 Ill. App. 412. See *Muscarelli v. Mercantile Trust Co.*, 219 Pa. St. 602, 69 Atl. 40.

² *Bayley v. Anderson*, 71 Wis. 417, 36 N. W. 863; *Elliott v. Wilkinson*, 8 Yerg. (Tenn.) 411.

³ *Dyer v. Middle Kittitas Irrig. Dist.*, 40 Wash. 238, 82 Pac. 301.

⁴ *Muscarelli v. Mercantile Trust Co.*, *supra*.

ment did not undertake to transfer title or guarantee possession, the implication of a contract that the government would pay is clearly rebutted and no implied contract can arise. The new contractor alone can be held liable for the conversion of the property.¹ Where appliances of a defaulting contractor are taken over by the government with knowledge of a chattel mortgage against some of them and the mortgagee entitled to possession demands these and the government refuses and retains them for use, and the mortgagee consents to the use upon an expectation and promise of payment, an implied contract to pay therefor will arise against the government.² But where a contract for the erection of a public building provided that in case of abandonment the public body might complete the structure, using for the purpose such material as was found upon the line of work, and when the contractor abandoned it the public body took possession and completed the building, the possession of the materials before the subsequent bankruptcy of the contractor gave the public body complete title against his trustee and such materials could be applied in reduction of the contractor's liability to the public body under the contract, not by virtue of any lien, but in the nature of a payment.³ Such a clause in a contract cannot create a lien upon future acquired property, and where a trustee in bankruptcy is appointed before possession is taken under it and the rights of creditors intervene, the public body can acquire no title.⁴ These clauses which provide that, in case of default in a public building contract by the contractor, the public body may complete and use materials brought by the con-

¹ *Ball Engineering Co. v. White*, 250 U. S. 46, 63 L. Ed. 835.

² *U. S. v. Buffalo Pitts Co.*, 193 Fed. 905, aff'd 234 U. S. 228, 58 L. Ed. 1290.

³ *Wilds v. Bd. of Education*, 227 N. Y. 211, 125 N. E. 89.

⁴ *Titusville Iron Co. v. New York*, 207 N. Y. 203, 100 N. E. 806.

tractor on the ground, being accountable to him for any excess of unpaid contract price over the cost of completion, are not for a forfeiture, which must therefore be construed strictly against the public body, since they do not involve the taking of any property of the contractor by way of penalty or punishment. They are in the interest of both parties and are to receive a construction which will accomplish that purpose.¹ Where the materials left behind by the contractor are less in value than the cost of completing the abandoned work beyond the contract amount, the contractor may not recover for such materials.²

§ 323. Property in Excavated Materials at Site—Chattels at Site.

If a contract to grade and improve a street provides that the contractor shall remove surplus earth and contains no reservation of title in the public body, or stipulation or direction as to what should be done with it, except to remove it from the line of work, this implies that a contractor may do what he wishes with it. The provision operates as an abandonment or transfer by the public body of all rights thereto and it becomes part of the contractor's compensation for doing the work, and his property, as soon, at least, as it is loaded upon vehicles for the purpose of removal. Where the public body changes the plan so that performance becomes impossible, the contractor is entitled to recover the difference between the cost of performance and the contract price, including as part thereof the market value of the surplus top soil after deducting the reasonable expense of marketing it.³ The

¹ Wilds v. Bd. of Educ., *supra*, and cases cited.

² Sch. Town of Winamac v. Hess, 151 Ind. 229, 50 N. E. 81.

³ Long Island Cont. & S. Co. v. New York, 204 N. Y. 73, 97 N. E. 483. See Welch v. McNeil, 214 Mass. 402, 101 N. E. 985.

clause requiring consent of the engineer to remove earth is not applicable to such as under the terms of the contract is made the property of the contractor.¹ When, in constructing a Barge Canal, the State requires buildings to be removed from the site and these buildings are made the property of the contractor to dispose of as he sees fit, the contractor may sell the buildings and the purchaser has a right to enter upon the premises to remove them.² Where buildings alone are thus conveyed, they stand in contemplation of law, severed from the soil and will vest as chattels in the grantee even before actual severance.³

¹ Long Island Cont. & S. Co. *v.* New York, 204 N. Y. 73, 97 N. E. 483; Hood *v.* Whitewell, 66 Misc. 49, 140 App. N. Y. Div. 882.

² Hood *v.* Whitewell, *supra*.

³ *Idem*; Schuchardt *v.* New York, 53 N. Y. 202.

CHAPTER XLVIII

BOND OF CONTRACTOR

§ 324. Statutory Bond—Power of Legislature to Require.

The legislatures of the States under their general power to change or repeal the common law may create new rights and impose new obligations unknown at common law, and when in the exercise of their sovereign power they enact that municipalities or the agents of the State or of the Nation shall require a bond of all public contractors for the faithful performance of public work and for the payment of all wages or moneys due to laborers and material men or subcontractors, these enactments are a valid exercise of legislative power.¹

§ 325. Public Body has Implied Right to Require Bond for Faithful Performance and to Pay Laborers and Material Men.

Even where express authority has not been conferred upon public bodies to require the contractor to give a bond to pay laborers and material men, these public bodies have implied power to insert in the contract or in the usual contractor's bond for faithful performance, the additional obligation that the contractor shall pay all laborers and material men who have claims, and that to the accomplishment of this object the public body may retain sufficient money due the contractor with which to pay such claims.²

¹ *Wilson v. Whitmore*, 92 Hun, 466, 157 N. Y. 693, 51 N. E. 1094; *St. Paul v. Butler*, 30 Minn. 459, 16 N. W. 362; *Carpenter v. Furrey*, 128 Cal. 665, 61 Pac. 369; *Grant v. Berrisford*, 94 Minn. 45, 101 N. W. 940.

² *McDonald v. New York*, 29 Misc. 504; *Baker v. Bryan*, 64 Iowa, 561, 21

This power is sustained as an exercise of that right which all public bodies possess to insert such reasonable provisions in their contracts as they may deem advisable; and in this instance such a provision enures to the benefit of a public body since if laborers and material men are secure, a better quality of labor and of material will be attracted to the work because of the assurance thus afforded. Furthermore, it gives credit to the contractor and enables him to procure labor and purchase material more readily and on better terms than otherwise. Greater competition in bidding results, so that it is not only to the interest of the public body, but its plain business duty to secure these advantages by the insertion of such a provision in the bond.¹ The consideration which supports the contract supports the bond which is required as a condition or term in awarding the contract.² Public bodies have the implied power also without statutory grant to require a bond to secure subcontractors as well as laborers and material men.³

N. W. 83; *Denver v. Hindry*, 40 Colo. 42, 90 Pac. 1028; *People's Lumber Co. v. Gillard*, 136 Cal. 55, 68 Pac. 576; *Amer. Surety Co. v. Lauber*, 22 Ind. App. 326, 53 N. E. 793; *King v. Downey*, 24 Ind. App. 262, 56 N. E. 680; *Knapp v. Swaney*, 56 Mich. 345, 23 N. W. 162; *Detroit Bd. of Educ. v. Grant*, 107 Mich. 151, 64 N. W. 1050; *Devers v. Howard*, 144 Mo. 671, 46 S. W. 625; *State ex rel. v. Webster*, 20 Mont. 219, 50 Pac. 558; *Kansas City Sch. Dist. v. Livers*, 147 Mo. 580, 49 S. W. 507; *Dolly v. Crume*, 41 Neb. 655, 59 N. W. 806; *Smith v. Bowman*, 32 Utah, 33, 88 Pac. 687; *Puget Sound State Bk. v. Gallucci*, 82 Wash. 445, 144 Pac. 698; *Amer. Rad. Co. v. Amer. Bond Co.*, 72 Neb. 100, 100 N. W. 138; *State v. Liebes*, 19 Wash. 589, 54 Pac. 26; *Phila. v. Stewart*, 195 Pa. 309, 45 Atl. 1056; *Phila. v. McLinden*, 205 Pa. 172, 54 Atl. 719; *Contra, Lyth v. Hingston*, 14 N. Y. App. Div. 11; *Park v. Sykes*, 67 Minn. 153, 69 N. W. 712; *Gastonia v. McEntee & Co.*, 131 N. C. 363, 42 S. E. 858; *Union Sheet Metal Wks. v. Dodge*, 129 Cal. 390, 62 Pac. 41; *U. S. Gypsum Co. v. Gleason*, 135 Wis. 539, 116 N. W. 238; *R. Connor Co. v. Ætna Indem. Co.*, 136 Wis. 13, 115 N. W. 811; *Hamilton v. Gambell*, 31 Oreg., 328, 48 Pac. 433.

¹ *St. Louis v. Von Phul*, 133 Mo. 561, 34 S. W. 843.

² *Young v. Young*, 21 Ind. App. 509, 52 N. E. 776; *Williams v. Markland*, 15 Ind. App. 669, 44 N. E. 562; *Kauffmann v. Cooper*, 46 Neb. 644, 65 N. W. 796; *Gastonia v. McEntee & Co.*, *supra*.

³ *National Surety Co. v. Hall-Miller Dec. Co.*, 104 Miss. 626, 61 So. 700.

§ 326. Construction.

There should be no favoritism or tenderness shown to a company organized to act as surety for hire.¹ While it is a well-settled rule that a surety is entitled to a somewhat rigid construction of his contract, before applying such rule his contract is subject to the same construction as any other contract, in order to ascertain and give effect to the intent of the parties. It is not until this is ascertained that its language is to be regarded as *strictissimi juris*.² The liability of a surety is, however, not to be extended by implication beyond the terms of his contract. To the extent, and in the manner and under the circumstances pointed out in his obligation he is bound, and no further. He has the right to stand on its terms.³ For the purpose of determining the intention of the parties the bond and the contract will be read together, where the bond refers to and embodies the contract within it.⁴ But some authorities deny the application of the rule *strictissimi juris* to surety companies organized for the purpose of conducting an indemnity business at established rates of compensation.⁵

§ 327. Validity of Bond of Contractor where Contract is Void—Where Statute not Followed.

Even though the contract pursuant to which a bond to

¹ *Richardson v. Steuben County*, 226 N. Y. 13, 122 N. E. 449; *Vil. of Argyle v. Plunkett*, 226 N. Y. 306, 124 N. E. 1; *Getchell v. Peterson*, 124 Iowa, 599, 615, 100 N. W. 550; *U. S. F. & G. Co. v. U. S.*, 191 U. S. 416, 48 L. Ed. 242.

² *Wilson v. Whitmore*, 92 Hun, 466, 157 N. Y. 693, 51 N. E. 1094; *U. S. use of Hill v. Amer. Surety Co.*, 200 U. S. 197, 50 L. Ed. 437.

³ *Glenn County v. Jones*, 146 Cal. 518, 80 Pac. 695; *Greenfield & Co. v. Parker*, 159 Ind. 571, 65 N. E. 747; *Sterling v. Wolf*, 163 Ill. 467, 45 N. E. 218.

⁴ *Searles v. Flora*, 225 Ill. 167, 80 N. E. 98; *U. S. use of Hill v. Amer. Surety Co.*, 200 U. S. 197, 50 L. Ed. 437; *Williams v. Markland*, 15 Ind. App. 669, 44 N. E. 562.

⁵ *U. S. F. & G. Co. v. U. S.*, 191 U. S. 416, 48 L. Ed. 242; *U. S. use of Dist. of Col. v. Bayly*, 39 App. D. C. 105.

pay laborers and material men is given turns out to be void, this fact cannot be set up by the sureties to defeat the claims of laborers and material men, since a guaranty of payment of an obligation or the performance of an undertaking imports an agreement that the instrument is valid and the undertaking legal.¹ The sureties are bound by the recitals in the bond of due execution of the contract.² Again, the contract between the material man or laborer and the contractor is independent of the public contract, and so the invalidity of the latter can have no effect upon the contract between laborers or material men and the public body.³ If the contract becomes void for omission to record it as required by law, this will not prevent a recovery upon the bond given to accompany the contract.⁴ Unless a statute makes a bond which fails to follow it void, if a bond is taken under the statute with a condition in part prescribed by statute and in part not provided, a recovery may be had upon the bond for a breach of the part provided by statute so long as it is clearly separable from the other part.

The super-additions will be regarded as surplusage.⁵ A bond voluntarily given may be enforced according to its term even though it exceeds the requirements of an ordinance providing for it.⁶ Of course those who furnish

¹ *Kansas City Hyd. P. B. Co. v. Nat. Surety Co.*, 140 Fed. 507; *Bell v. Kirkland*, 102 Minn. 213, 113 N. W. 271; *Philadelphia v. McLinden*, 205 Pa. 172, 54 Atl. 719; *Kansas City ex rel. Diamond B. & T. Co. v. Schroeder*, 196 Mo. 281, 93 S. W. 405; *Contra*, *Portland v. Bitum. Pav. Co.*, 33 Oreg. 307, 52 Pac. 28.

² *Bell v. Kirkland*, *supra*.

³ *Kansas City ex rel. Diamond B. & T. Co. v. Schroeder*, 196 Mo. 281, 93 S. W. 405; *Kansas City H. P. Co. v. National Surety Co.*, 157 Fed. 620; *National Surety Co. v. Kansas City Hyd. B. Co.*, 73 Kan. 196, 84 Pac. 1034; *National Surety Co. v. Wyandotte C. & T. Co.*, 76 Kan. 914, 92 Pac. 1111.

⁴ *Kiessig v. Allspaugh*, 91 Cal. 231, 27 Pac. 655, 13 L. R. A. 418, 99 Cal. 452, 34 Pac. 106; *Summertown v. Hanson*, 117 Cal. 252, 49 Pac. 135.

⁵ *Detroit Bd. of Educ. v. Grant*, 107 Mich. 151, 64 N. W. 1050.

⁶ *Philadelphia v. Nichols Co.*, 214 Pa. St. 265, 63 Atl. 886.

materials with knowledge of or participation in the illegality of a contract cannot recover on the bond which accompanies the contract.¹

§ 328. Effect of Naming Different Obligee than Statute Provides.

Where these various material men's statutes require a bond to be given to the State, the Nation or some subdivision or branch of either and the bond fails to indicate the obligee named in the statute, this will not defeat a recovery. The bond will become thereby invalid as a statutory bond, but will be considered good as a common-law bond.² In such cases the obligor by his consent to make a board of education, for example, the trustee for the interested parties instead of the State as required by statute makes the bond a good common-law obligation and himself liable thereon.³

§ 329. Statutory Provision Requiring—Waiver of Bond of Contractor.

Where a statute requires that a bond shall be given in all cases where municipalities make improvement contracts, which bond shall be conditioned for the faithful performance of the work in accordance with the plans and specifications and the terms of the contract, and the intent of the statute is to make this requirement for the protection of the State which pays the larger part of the cost of the improvements, the requirement must be strictly followed, since the municipal officers have no power to expend the money of the State for other purposes than that for which

¹ National Surety Co. v. Wyandotte Coal Co., 76 Kan. 914, 92 Pac. 1111; National Surety Co. v. Kansas City H. P. B. Co., 73 Kan. 196, 84 Pac. 1034.

² Detroit Board of Education v. Grant, 107 Mich. 151, 64 N. W. 1050; Stephenson v. Monmouth Min. & Mfg. Co., 84 Fed. 114; Huggins v. Sutherland, 39 Wash. 552, 82 Pac. 112.

³ Detroit Bd. of Education v. Grant, *supra*.

it was appropriated and possess no power to waive any of the requirements of the statute designed to safeguard the interests of the State and the taxpayers.¹

§ 330. Public Officials have Discretion as to Sufficiency of Bond of Contractor.

Statutes requiring the giving of a contractor's bond usually provide that the contractor shall execute a bond with sufficient sureties or contain similar language. Such language confers a discretion upon the public officials to pass upon the adequacy of the bond and the qualification of the sureties, and when such discretion is conferred it will not be controlled or interfered with by the courts, unless there is an abuse of discretion or corrupt conduct.²

§ 331. Kind of Labor or Material Included in State Statutes.

The general rule is that the bond is only liable for labor and materials furnished or supplied which have gone into and become a part of the work.³ Accordingly it is generally ruled under bonds given on State and city work that no recovery can be had for machinery used or repaired in the prosecution of the work. A contractor is presumed to be prepared with machinery, tools and appliances necessary to carry out his contract. These are furnished upon his own credit presumably and not upon the implied credit of the public. They survive the performance of the work, do not become a part of it and may be used upon other

¹ Kelly v. Torrington, 81 Conn. 615, 71 Atl. 939.

² Boseker v. Wabash County, 88 Ind. 267; Vincent v. Ellis, 116 Iowa, 609, 88 N. W. 836; State ex rel. Woodruff & Co. v. Bartley, 50 Neb. 874, 70 N. W. 367; People ex rel. J. B. Lyon Co. v. McDonough, 76 N. Y. App. Div. 257, 173 N. Y. 181, 65 N. E. 963; People ex rel. McKone v. Green, 52 How. Pr. 304; People ex rel. Belden v. Contracting Bd., 27 N. Y. 378.

³ Beals v. Fidelity & D. Co., 76 N. Y. App. Div. 526, 178 N. Y. 581, 70 N. E. 1095.

work.¹ But materials furnished under a public contract, suitable for the work to be performed, and delivered at the site will justify recovery upon the bond without a showing that they actually were used in the construction.² The scope and purpose of the contract and bond will largely control the character of labor and material to which the bond will be extended. It will include the labor at a quarry where the contractor agreed to get out and furnish stone, even though the laborers did not know the structural destination of such stone.³ Thus labor in the operation of a pile driver was brought within the bond.⁴ A watchman employed to guard material at the site of work can sue upon the bond for wages due.⁵ And the wages due to a blacksmith engaged in sharpening tools are likewise included.⁶ Lumber used in false work erected in the course of construction of a permanent bridge is included within the bond.⁷ Where the bond covers any claim for which if established the public body might become liable, it is broad enough to cover materials used in erecting a temporary fence needed in a public improvement.⁸ Explosives used to blast rock in the course of construction

¹ Kansas City use of Kansas City H. P. B. Co. *v.* Youmans, 213 Mo. 151, 112 S. W. 225; Alpena *ex rel.* Besser *v.* Title G. & S. Co., 159 Mich. 329, 123 N. W. 1126; Alpena *ex rel.* O'Brien *v.* Same, 159 Mich. 334, 123 N. W. 1127; Empire State Surety Co. *v.* Des Moines, 152 Iowa, 552, 131 N. W. 870; 152 Iowa, 531, 132 N. W. 837, Fid. & D. Co. *v.* Hegewald Co., 144 Ky. 790, 139 S. W. 975; Standard Boiler Wks. *v.* Nat. Surety Co., 71 Wash. 28, 127 Pac. 573.

² Red Wing Sewer P. Co. *v.* Donnelly, 102 Minn. 192, 113 N. W. 1; Bell *v.* Kirkland, 102 Minn. 213, 113 N. W. 271.

³ Combs *v.* Jackson, 69 Minn. 336, 72 N. W. 565; Duby *v.* Jackson, 69 Minn. 342, 72 N. W. 568.

⁴ Geo. H. Sampson Co. *v.* Comm., 202 Mass. 326, 88 N. E. 911.

⁵ Friedman *v.* Hampden County, 204 Mass. 494, 90 N. E. 851.

⁶ French *v.* Powell, 135 Cal. 636, 68 Pac. 92.

⁷ Empire State Surety Co. *v.* Des Moines, 152 Iowa, 531, 131 N. W. 870, 152 Iowa, 552, 132 N. W. 837.

⁸ Friedman *v.* Hampden County, *supra*.

of a public work are materials within the bond, since they are used directly upon the work in the process of construction to bring it into proper form and condition and are entirely consumed in the use.¹ In like manner coal used upon the work is also material or supplies necessary for the construction of the work and so comes within such terms of a bond.² When, however, the terms of the bond relate to the materials supplied in accordance with the contract and specifications, which do not include coal, even though it is necessarily used as an aid to the work it is not within the bond.³ Provisions or board furnished to men or merchandise or goods given through store orders as wages are not included usually within a bond. Money loaned to furnish the pay roll for labor upon the work is not within the bond.⁴ Hay and grain used to feed teams used upon the work for purposes of construction are, however, covered by the bond.⁵ So are the teams furnished,⁶ but money expended for cartage, towing or dockage is not one of the objects intended by the bond and will not support a suit.⁷ A claim for the rental of scrapers is not labor performed or materials furnished on a public work.⁸ Planks used for sheathing and left in place together with piles driven into the work come within the bond.⁹

¹ *Geo. H. Sampson Co. v. Comm.*, *supra*; *E. I. Du Pont De Nemours P. Co. v. Culgin Pace Cont. Co.*, 206 Mass. 585, 92 N. E. 1023; *Kansas City use of Kansas City H. P. B. Co. v. Youmans*, 213 Mo. 151, 112 S. W. 225.

² *Zipp v. Fid. & D. Co.*, 73 N. Y. App. Div. 20; *National Surety Co. v. Brotnaber L. Co.*, 67 Wash. 601, 122 Pac. 337; *Contra*, *George H. Sampson Co. v. Comm.*, *supra*.

³ *Philadelphia v. Malone*, 214 Pa. 90, 63 Atl. 539; *Alpena use of Gilchrist v. Title G. & T. Co.*, 168 Mich. 350, 134 N. W. 23.

⁴ *Cadenasso v. Antonelle*, 127 Cal. 382, 59 Pac. 765.

⁵ *National Surety Co. v. Bratnaber L. Co.*, *supra*.

⁶ *French v. Powell*, 135 Cal. 636, 68 Pac. 92.

⁷ *Alpena ex rel. Beaudrie v. Murray Co.*, 159 Mich. 336, 123 N. W. 1128.

⁸ *Hall v. Cowen*, 51 Wash. 295, 98 Pac. 670.

⁹ *Geo. H. Sampson Co. v. Comm.*, *supra*.

§ 332. What Labor and Materials Included under Federal Act.

Technical rules otherwise protecting sureties from liability are never applied in proceedings under the federal act.¹ The federal act requiring a contractor to furnish a bond to pay for labor and materials used on the work is not limited to labor and materials directly incorporated into the public work but includes anything which is an integral part of the work, and necessarily involved in it, anything indispensable to the prosecution of the work and used exclusively in its performance.² The act is to be construed liberally for the protection of those who furnish labor or materials in the prosecution of public work.³ Where a contractor runs a boarding house not as an independent enterprise, but as an indispensable and integral part of the work, groceries sold to the contractor and consumed by the laborers are materials supplied and used in the prosecution of the work, and recovery for their value may be had against the bond.⁴ Coal furnished to operate engines on dredges has been considered material used in the prosecution of the work.⁵ Claims allowed against the bond include not only cartage and towage of material, but also claims for drawings and patterns used by the contractor in making molds for castings which enter into the construction of a ship.⁶ Where the work contracted for was building a breakwater, recovery was allowed for labor at a quarry operated fifty miles

¹ *Illinois Surety Co. v. Davis Co.*, 244 U. S. 376, 61 L. Ed. 1206, aff'g 226 Fed. 653.

² *Brogan v. National Surety Co.*, 246 U. S. 257, 62 L. Ed. 703.

³ *Idem.*

⁴ *Idem.*

⁵ *City Trust S. & D. Co. v. U. S.*, 147 Fed. 155; *U. S. use of Lyman Coal Co. v. U. S. F. & G. Co.*, 82 Vt. 94, 71 Atl. 1106, 83 Vt. 278, 75 Atl. 280.

⁶ *Title G. & T. Co. v. Crane Co.*, 219 U. S. 24, 34, 55 L. Ed. 72, aff'g 163 Fed. 168; *Amer. Surety Co. v. Lawrenceville Cement Co.*, 110 Fed. 717.

distant. This included the labor not only of men who stripped the earth to get at the stone and who removed the debris, but carpenters and blacksmiths who repaired the cars and track equipment used to haul stone to the quarry dock. It included also the wages of the men who drove the horses which hauled the cars on the track.¹ Rental for cars, track and other equipment used by a contractor in facilitating his work as well as the expense of loading this equipment and the freight paid to transport it to the site of use was allowed against the bond.² Since the basis of recovery is supplying labor and material for the public work, he who supplies them to a subcontractor may claim under the bond,³ even if the subcontractor has been fully paid.⁴ But money loaned to meet the pay roll of the contractor will not give rise to a claim under the act.⁵ Patterns furnished to the molding department of a contractor building a government vessel are within the bond.⁶ Freight and demurrage paid on timber used on the work may constitute the subject of suit under the federal act.⁷

§ 333. Limitations on Proceedings under Federal Act.

The material men's act of 1894 as amended by act of 1905 is intended to be highly remedial. Its purpose is to give a remedy to material men and laborers on the bond of

¹ U. S. *Fid. Co. v. Bartlett*, 231 U. S. 237, 58 L. Ed. 200, aff'g 189 Fed. 339.

² *Illinois Surety Co. v. Davis Co.*, 244 U. S. 376, 61 L. Ed. 1206, aff'g 226 Fed. 653. See U. S. *ex rel. McAllister v. Fid. & D. Co.*, 86 N. Y. App. Div. 475.

³ U. S. *v. Jack*, 124 Mich. 210, 82 N. W. 1049.

⁴ *Mankin v. Ludowici-Celadon Co.*, 215 U. S. 533, 54 L. Ed. 315, aff'g 158 Fed. 1021.

⁵ *Hardaway v. National Surety Co.*, 211 U. S. 552, 53 L. Ed. 321, aff'g 150 Fed. 465; *Fidelity Nat. Bank v. Rundle*, 107 Fed. 227.

⁶ *Title G. & T. Co. v. Crane Co.*, 219 U. S. 24, 34, 55 L. Ed. 72, aff'g 163 Fed. 168.

⁷ U. S. use of *Nicola v. Hegeman*, 204 Pa. St. 438, 54 Atl. 344.

the original contractor and a reasonable time to enforce it, and in a single proceeding to unite all claimants.¹ Where there is a conflict in its provisions these will be adapted to fulfill its whole purpose, and those provisions fittest to accomplish that result will prevail.² The act provides for the execution of a bond by any person entering into any formal contract with the United States for any public work and that in any action instituted by the United States any person who has furnished materials or labor to the contractor may intervene and become a party to the action. If no action is brought by the government within six months from the completion and final settlement of the contract, then any person furnishing labor or materials may bring suit in the name of the United States in the district court of the United States in which the contract was to be performed and executed irrespective of the amount in controversy for his or their use and benefit against the contractor and his sureties.³ No right of action accrues to a material man until the time reserved to the United States to sue has expired.⁴ The provision of the statute requiring notice to be given to other creditors, by the creditor instituting the single proceeding allowed where the government has not sued, is directory merely. It was never intended to give to a surety company a right to have done that which it is its interest not to have performed. The provision for notice, therefore, is not of the essence of jurisdiction over the case nor a condition of liability of the surety on the bond.⁵

§ 334. Who are Beneficiaries under Statute.

Where the Nation, the State or a municipal subdivision

¹ *A. Bryant Co. v. N. Y. Steam Fitting Co.*, 235 U. S. 327, 59 L. Ed. 253.

² *Idem.*

³ *Idem.*

⁴ *Texas Cement Co. v. McCord*, 233 U. S. 157, 58 L. Ed. 893.

⁵ *A. Bryant Co. v. N. Y. Steam Fitting Co.*, *supra*.

of the State seeks to protect its inhabitants in public contracts by covenants for their benefit, the persons intended as beneficiaries may sue directly to enforce such covenants, and may recover the loss suffered by them in so far as they are protected by such covenants. Where accordingly bonds are given upon public contracts for the payment of wages to laborers or to pay the claims of material men, these may sue upon such bonds and recover the amount of such wages or of the claims for material against the surety. But unless there is an intention to include them in the contract or the State has some interest in protecting them, the bond will not be extended to cover these claims.¹

§ 335. Who are Beneficiaries under Statute—Subcontractors.

Bonds given by contractors to protect material men and laborers inure to the benefit of subcontractors under State and municipal statutes² and under the broad scope of the federal act are of course included.³ Even in those States where a strict rule is followed excluding subcontractors from participating in the benefits of the bond, he is often let into these by a construction which makes him a material man.⁴

§ 336. When Bond Runs to Public Body—Rights of Laborers and Material Men.

Where the bond given by a contractor to pay wages of

¹ *Wilson v. Whitmore*, 92 Hun, 466, 157 N. Y. 693, 51 N. E. 1094; *Fosmire v. National Surety Co.*, 229 N. Y. 44, 127 N. E. 472; *Eastern Steel Co. v. Globe Indem. Co.*, 227 N. Y. 586, 125 N. E. 917; *Buffalo Cement Co. v. McNaughton*, 90 Hun, 74, 156 N. Y. 702, 51 N. E. 1089. See *Argyle v. Plunkett*, 226 N. Y. 306, 124 N. E. 1.

² *Combs v. Jackson*, 69 Minn. 336, 72 N. W. 565; *Daly v. Jackson*, 69 Minn. 342, 72 N. W. 568; *Philadelphia v. Nichols Co.*, 214 Pa. St. 265, 63 Atl. 886; *Ihrig v. Scott*, 5 Wash. 584, 32 Pac. 466; *Contra*, *People use of Winkle T. C. Co. v. Cotteral*, 119 Mich. 27, 77 N. W. 312.

³ U. S. use of *Croll v. Jack*, 124 Mich. 210, 82 N. W. 1049.

⁴ *People use of Emack v. Thompson*, 119 Mich. 21, 77 N. W. 314.

laborers and claims of material men runs to the State or the municipality, some jurisdictions hold that laborers and material men cannot sue upon the contract.¹ There is, however, a substantial current of authority which holds that in substance and in purpose the bond was given to pay obligations to these third persons, and they readily find the existence of an intention to benefit them and a duty, legal or equitable, which gives a just claim to enforce the bond directly and in their own names against the surety.² Some jurisdictions sustain the doctrine of the right of a laborer or material man to sue but hold that the bond sued on must show a promise to pay for labor and materials furnished, and an intention to benefit those furnishing labor and material and when these characteristics exist in the bond find no difficulty in enforcing it.³

When these bonds are given pursuant to a statute, the courts very generally carry out liberally the remedial purposes of the statute and allow the beneficiaries under the bond and statute to sue directly upon the bond.⁴ Where the statutes either of the State or Nation do not admit of a mechanic's lien being filed against public work the courts

¹ *Searles v. Flora*, 225 Ill. 167, 80 N. E. 98; *Fosmire v. Nat. Surety Co.*, 229 N. Y. 44, 127 N. E. 472; *Eastern Steel Co. v. Globe Indem. Co.*, 227 N. Y. 586, 125 N. E. 917; *Buffalo Cement Co. v. McNaughton*, 90 Hun, 74, 156 N. Y. 702, 51 N. E. 1089; *Village of Argyle v. Plunkett*, 226 N. Y. 306, 124 N. E. 1; *Hipwell v. National Surety Co.*, 130 Iowa, 656, 105 N. W. 318; *Elec. Appliance Co. v. U. S. Fid. & G. Co.*, 110 Wis. 434, 85 N. W. 648.

² *Nat. Surety Co. v. Foster Lumber Co.*, 42 Ind. App. 671, 85 N. E. 489; *Williams v. Markland*, 15 Ind. App. 669, 44 N. E. 562; *Devers v. Howard*, 144 Mo. 671, 46 S. W. 625; *Sch. Dist. ex rel. Koken I. Wks. v. Livers*, 147 Mo. 580, 49 S. W. 507; *Burton v. Larkin*, 36 Kan. 246, 13 Pac. 398; *Doll v. Crume*, 41 Neb. 655, 59 N. W. 806; *Kauffman v. Cooper*, 46 Neb. 644, 65 N. W. 796.

³ *Parker v. Jeffery*, 26 Oreg. 186, 37 Pac. 712; *St. Louis v. G. H. Wright Cont. Co.*, 202 Mo. 451, 101 S. W. 6; *Wilson v. Whitmore*, 92 Hun, 466, 157 N. Y. 693, 51 N. E. 1094; *Montgomery v. Rief*, 15 Utah, 495, 50 Pac. 623.

⁴ *Bohn v. McCarthy*, 29 Minn. 23, 11 N. W. 127; *Morton v. Power*, 33 Minn. 521, 24 N. W. 194; *Wilson v. Whitmore*, 92 Hun, 466, 157 N. Y. 693, 51 N. E. 1094; *Baum v. Whatecom County*, 19 Wash. 626, 54 Pac. 29.

readily support the purpose of these statutes, requiring the giving of a bond to pay laborers and material men, as a substitute for a lien.¹ Thus where the condition of the bond is in effect to pay all laborers and material men for labor performed or materials furnished, the bond gives a clear right to such claimants to sue upon it.² Where a bond, read in its entirety, is inconsistent with an intention that a laborer and others in like position should have the right to sue on it, such right will be denied. Such intention is negatived when the dominant purpose of the bond is protection to the State or other public body. If laborers ignoring the people may sue in their own right as often as there is default, such dominant purpose may be defeated, by the exhaustion of the penalty of the bond and the leaving of nothing to satisfy any demands of the State.³ Where a bond is conditioned for the payment of wages and nothing else the intention to confer a right of suit will be the more readily inferred since the State has an interest in those who labor upon public works. The intent to benefit them and the existence of the duty would then give a right of action upon a contractor's bond.⁴ Of course where the people sue upon such a bond for the benefit of laborers the right of suit and the right of recovery exist in the State as trustee to collect moneys due such laborers

¹ *King v. Downey*, 24 Ind. App. 262, 56 N. E. 680; U. S. use of Vermont Marble Co. v. Burgdorf, 13 App. D. C. 506; *Kansas City Hyd. P. B. Co. v. Nat. Surety Co.*, 149 Fed. 507; U. S. use of *Hill v. Amer. Surety Co.*, 200 U. S. 197, 50 L. Ed. 437.

² *Fitzgerald v. McClay*, 47 Neb. 816, 66 N. W. 828; *Hipwell v. National Surety Co.*, 130 Iowa, 656, 105 N. W. 318; *Williams v. Markland*, 15 Ind. App. 669, 44 N. E. 562; U. S. *Gypsum Co. v. Gleason*, 135 Wis. 539, 116 N. W. 238; *Gastonia v. McEntee Peterson E. Co.*, 131 N. C. 363, 42 S. E. 858; *E. I. Du Pont De Nemours P. Co. v. Culgin Pace Cont. Co.*, 206 Mass. 585, 92 N. E. 1023; *Nelson Co. v. Stephenson*, 168 S. W. (Tex.) 61; *Amer. Surety Co. v. Raeder*, 15 Ohio C. C. 47, 61 Ohio St. 661, 57 N. E. 1130.

³ *Fosmire v. National Surety Co.*, 229 N. Y. 44, 127 N. E. 472.

⁴ *Idem.*

and material men as well. Where the right is directly conferred upon a laborer or material man to sue in his own name upon a bond he can bring such suit provided he knew of the existence of the bond and furnished the labor or materials, relying upon it even where the bond runs to the State or other public body.¹

§ 337. Condition of Bond of Contractor for Faithful Performance of Work—Indemnity for Public Body.

A bond conditioned for the faithful performance of the work is a bond for the indemnity of the public body merely and laborers and material men cannot sue upon such bond to recover wages or moneys due them,² unless it appears to have been the clear purpose and intent of the bond to permit of such suit to satisfy their claims as within the protection of the bond.³

§ 338. For Negligence in Doing Work.

Where a bond is taken by a municipality to protect itself against loss occasioned by the negligence of the contractor for his failure to comply with laws and ordinances, such bond cannot make the public body liable if it is otherwise not liable. Taking the bond cannot increase its liability nor will it give a right of action against the public

¹ *Buffalo Cement Co. v. McNaughton*, 90 Hun, 741, 156 N. Y. 702, 51 N. E. 1089.

² *Searles v. Flora*, 225 Ill. 167, 80 N. E. 98; *Sterling v. Wolf*, 163 Ill. 467, 45 N. E. 218; *Buffalo Cement Co. v. McNaughton*, 90 Hun, 74, 156 N. Y. 702, 51 N. E. 1089; *Noyes v. Granger*, 51 Iowa, 227, 1 N. W. 519; *Elec. Appliance Co. v. U. S. F. & G. Co.*, 110 Wis. 434, 85 N. W. 648; *Lancaster v. Fresecoln*, 192 Pa. St. 452, 43 Atl. 961; *Puget Sound B. & T. Co. v. Sch. Dist. Kings Co.*, 12 Wash. 118, 40 Pac. 608; *Parker v. Jeffery*, 26 Oreg. 186, 37 Pac. 712; *Hart v. State*, 120 Ind. 83, 21 N. E. 654, 24 N. E. 151; *Green Bay Lumber Co. v. Indep. Sch. Dist.*, 121 Iowa, 663, 97 N. W. 72. See *Kansas City ex rel. v. Blum v. O'Connell*, 99 Mo. 357, 12 S. W. 791.

³ *St. Louis v. Von Phul*, 133 Mo. 561, 34 S. W. 843; *Lyman v. Lincoln*, 38 Neb. 794, 57 N. W. 531.

body or even permit suit against the surety by third persons injured since its purpose is to indemnify the public body.¹

§ 339. Obligation of Public Body to Retain Money Due Contractor Who Fails to Pay for Labor and Material.

Simply because a public body exacts a bond to pay laborers and material men will not make it trustee for the purpose of enforcing the rights of other parties accruing because of the delinquency of the contractor. The first duty of a public body is to protect its own rights under a contract and not subordinate these to collateral rights of others. If it promises to pay money to its contractor it is under obligation so to do, and is powerless to do otherwise. The public body has no right, therefore, to withhold money due its contractor where he defaults in paying laborers or material men. Even if the surety requests the public body to withhold the money the latter has no obligation or right to do so and neglects no duty it owes the surety by refusing to enforce the contractor's obligation toward his materialmen or laborers.²

§ 340. Failure of Public Body to Hold Reserved Fund Retained under Contract will Release Surety—When not as to Laborers and Material Men.

The general rule applicable to hired and other sureties is that the surety is discharged from the bond if the public body for whom work is being performed fails to retain the percentage fixed by the contract.³ But this violation of the

¹ *Kansas City ex rel. Blum v. O'Connell*, 99 Mo. 357, 12 S. W. 791; *Terry v. Richmond*, 94 Va. 537, 27 S. E. 429; *Moss v. Rowlett*, 112 Ky. 121, 65 S. W. 153; *Redditt v. Wall*, 55 So. (Miss.) 45.

² *American Surety Co. v. Bd. of Waseca County*, 77 Minn. 92, 79 N. W. 649; *Philadelphia v. McLinden*, 205 Pa. St. 172, 54 Atl. 719.

³ *Lucas County v. Robert*, 49 Iowa, 159; *Gray v. Sch. Dist.*, 35 Neb. 438, 53

contract by the public body will not release the surety as to laborers and material men for any moneys due to them, before such overpayment.¹

§ 341. Obligation of Surety—Release of Surety Through Failure of Creditors of Contractor to File Claims and Secure Preference.

Where by statute subcontractors, laborers and material men are given a preference out of funds due a contractor upon public work provided they file a statement of their demand with the public officer through whom payment for the work is to be made, if these laborers, material men or subcontractors fail to file their claims this will not release the surety. A creditor does not release a surety by not enforcing his claim, unless he fails in some duty assumed to the surety by the contract, express or implied, or fails to sue when notified by a surety as provided by statute or fails to preserve some lien or security which he has for the principal's debt. His right of preference is not a lien, and the creditor is therefore not bound to any active diligence in enforcing his claim against the principal. It is the debt of the surety as well. While a creditor cannot do any act

N. W. 377; *Glenn County v. Jones*, 146 Cal. 518, 80 Pac. 695; *Neilson v. Title G. & S. Co.*, 81 Oreg. 422, 159 Pac. 1151; *O'Neill v. Title G. & T. Co.*, 191 Fed. 570; *Prairie State Nat. Bk. v. U. S.*, 164 U. S. 227, 41 L. Ed. 412, aff'g 27 Ct. Cl. 185; *Morgan v. Salmon*, 18 N. M. 73, 135 Pac. 553; *Wasco Co. v. New England Equit. Ins. Co.*, 88 Oreg. 465, 172 Pac. 126, L. R. A. 1918 D. 732; *Jersey City W. S. Co. v. Metropolitan Cons. Co.*, 76 N. J. L. 419, 69 Atl. 1088; *National Surety Co. v. Long*, 79 Ark. 523, 96 S.W. 745; *Pauly Jail Bldg. & M. Co. v. Collins*, 138 Wis. 494, 120 N. W. 225; *New Haven v. Nat. Steam Economizer Co.*, 79 Conn. 482, 65 Atl. 959; *Chicago v. Agnew*, 264 Ill. 288, 106 N. E. 252. See *Hipwell v. Nat. Surety Co.*, 130 Iowa, 656, 105 N.W. 318.

¹ *U. S. Fid. & G. Co. v. American Blower Co.*, 41 Ind. App. 620, 84 N. E. 555; *Conn v. State*, 125 Ind. 514, 25 N. E. 443; *Empire State Surety Co. v. Des Moines*, 152 Iowa, 531, 131 N. W. 870; *U. S. v. Nat. Surety Co.*, 92 Fed. 549; *Kansas City Sch. Dist. v. Livers*, 147 Mo. 580, 49 S. W. 507; *Bethany v. Howard*, 149 Mo. 504, 51 S. W. 94; *Kauffman v. Cooper*, 46 Neb. 644, 65 N. W. 796; *Amer. Surety Co. v. Waseca Co.*, 77 Minn. 92, 79 N. W. 649.

injurious to the surety or inconsistent with the surety's rights, he may remain entirely passive and rely upon the undertaking of the surety. He is not bound to prosecute an action to obtain a lien. If the funds in the hands of the public body are exhausted in paying other claims the surety is still liable.¹

§ 342. Discharge of Bond of Contractor—Effect on Claims of Laborers and Material Men.

If in the performance of public work a bond is required to pay claims of laborers and material men and by its own terms it is discharged upon acceptance of the work or structure, this operates as a release of the surety.² This applies in the case of a material man especially where the public body in good faith accepts a building, before the material man knew of the existence of the bond, or relied upon it in any way.³ Public corporations are under no obligation to protect laborers or material men, and if they desire protection they must secure their claims in the manner provided by a particular statute or make their claims within the time limited therefor, and, where a bond is annulled by acceptance of the work, before such event occurs.⁴

§ 343. Effect of Renewal of Contract.

If a bond is given for a stated period, the limitation of time fixed in the contract and specifically mentioned will control and will measure the life of the bond. It will not be extended to include a renewal contract which in con-

¹ *Whitehouse v. Am. Surety Co.*, 117 Iowa, 328, 90 N. W. 727; *Read v. Amer. Surety Co.*, 117 Iowa, 10, 90 N. W. 590; *Philadelphia v. Pierson*, 217 Pa. St. 193, 66 Atl. 321; *People v. Powers*, 108 Mich. 339, 66 N. W. 215.

² *Internat. Trust Co. v. Keefe Mfg. Co.*, 40 Colo. 440, 91 Pac. 915.

³ *Idem.*

⁴ *Internat. Trust Co. v. Keefe Mfg. Co.*, *supra*; *Empire State Surety Co. v. Des Moines*, 152 Iowa, 531, 131 N. W. 870; *Elec. Appliance Co. v. U. S. F. & G. Co.*, 110 Wis. 434, 85 N. W. 648.

templation of law constitutes a separate and distinct contract for the renewal period.¹ Of course if no new contract is required the obligation of the bond will continue during the renewal.

§ 344. Abandonment of Contract—Subrogation by Surety to Rights of Public Body—Priority of Assignments.

The provision in the contract that the public body will retain a certain percentage out of current estimates serves to secure the public body against non-performance of the contract and gives the public body the right to hold these funds in case the contractor abandons his work in order to pay any damage it may suffer thereby.² This right of the public body to retain these percentages enures from the time the contract is made; and until its claims and claims for labor and material as provided in the contract are paid, such right is superior to any equitable assignee of the contractor.³ And so when the surety on the bond of the contractor pays debts incurred by the contractor for labor and material it is entitled to be subrogated to these rights of the public body against the fund in preference to such an equitable assignee,⁴ because the surety's right of subrogation is bound up in the contract and dates back to the time when it entered into the contract of suretyship.⁵ This is so for the further reason that

¹ U. S. use of Dist. of Columbia *v.* Bayly, 39 App. D. C. 105.

² First Nat. Bk. *v.* O'Neil Eng. Co., 176 S. W. (Tex.) 74; Wasco County *v.* New England Equit. Ins. Co., 88 Ore. 465, 172 Pac. 126, L. R. A. 1918 D. 732; First Nat. Bk. *v.* City Trust Co., 114 Fed. 529, 531; Prairie St. Nat. Bk. *v.* U. S., 164 U. S. 227, 232, 41 L. Ed. 412, aff'g 27 Ct. Cl. 185; O'Neill *v.* Title G. & T. Co., 191 Fed. 570; *Re* Scofield Co., 215 Fed. 45, 50.

³ Wasco County *v.* New England Equit. Ins. Co., *supra*.

⁴ Wasco County *v.* New England Equit. Ins. Co., *supra*; Prairie State N. Bk. *v.* U. S., *supra*; Reid *v.* Pauley, 121 Fed. 652; Hipwell *v.* National Surety Co., 130 Iowa, 656, 105 N. W. 318.

⁵ Prairie State N. Bk. *v.* U. S., *supra*; Henningsen *v.* U. S. F. & G. Co., 143

this reserve fund is as much for the protection and indemnity of the surety as it is for the security of the public body, and an equity in such fund is raised in behalf of the surety.¹ The right of subrogation is particularly applicable to these funds. This right cannot be defeated by a bank which loans money to a contractor to carry on his work and takes an assignment to secure the loan, and the equity of the surety and his priority in these reserved moneys will be sustained as against such an assignee, even though the fund is thereby exhausted and nothing is left for the bank assignee.² The bank is bound to know of the rights of a surety under these circumstances and will be deemed to act with full knowledge of a surety's rights.³

Where, therefore, the surety on a contractor's bond completes work abandoned by a contractor, such surety is entitled to moneys under the contract, sufficient to save him from loss on his suretyship contract, and such right is superior to any assignment made by the contractor.⁴

§ 345. Liability of Public Officer for Failure to Take Bond Required by Statute.

Where a statute does not in terms impose liability upon public officers for failure to exact a bond from a contractor to pay claims of laborers and material men, no individual

Fed. 810, 208 U. S. 404, 411; *First Nat. Bk. v. City Trust S. & D. Co.*, 114 Fed. 529; *National Surety Co. v. Berggren*, 126 Minn. 188, 148 N. W. 55; *Wasco Co. v. New England Equit. Ins. Co.*, *supra*.

¹ *First Nat. Bank v. City Trust L. D. & S. Co.*, 114 Fed. 529; *O'Neil v. Title G. & T. Co.*, 191 Fed. 570; *Re Scofield Co.*, 215 Fed. 45; *First Nat. Bk. v. Pasha*, 99 Neb. 785, 157 N. W. 924; *Maryland Casualty Co. v. Washington N. Bk.*, 92 Wash. 497, 159 Pac. 689.

² *Wasco County v. New England Equit. Ins. Co.*, *supra*.

³ *Idem*.

⁴ *Prairie State Nat. Bk. v. U. S.*, *supra*; *First Nat. Bk. v. City Trust S. D. & S. Co.*, 114 Fed. 529; *Reid v. Pauly*, 121 Fed. 652; *First Nat. Bk. v. Sch. Dist.*, 110 N. W. (Neb.) 349; *Gastonia v. McEntee P. Eng. Co.*, 131 N. C. 359, 42 S. E. 857; *Contra, Dowling v. Seattle*, 22 Wash. 592, 61 Pac. 709.

liability of the officers will ensue so as to make them subject to suit for such omission.¹ This is so because the duty imposed is upon him to act not individually but as a public officer. The neglect, therefore, is that of the public body, not of the officer.² But where the duty imposed by statute is a ministerial duty, the material men or laborers injured by breach of the duty may sue the officers for failure to perform it and recover of them individually.³ But no recovery will be permitted unless after refusal to pay by the contractor upon demand, or upon proof of insolvency.⁴ And if instead of complying with the statute the bond obtained is a good common-law bond no liability of the officer for not obtaining the statutory bond can arise,⁵ especially where the public body does not prevent suit by those for whose benefit it was received.

§ 346. Obligation Assumed by Public Body for Failure to Require Contractor to Give Statutory Bond.

When the duty imposed by statute upon a public body to obtain a bond from a contractor for public work conditioned to pay the claims of laborers and material men is a public duty and not a corporate duty the public body is not liable for its failure to exact the bond.⁶ Where of course, the statute imposes liability upon the public body

¹ *Blanchard v. Burns*, 110 Ark. 515, 162 S. W. 63; *Hydraulic P. B. Co. v. Sch. Dist.*, 79 Mo. App. 665; *Templeton v. Nipper*, 107 Tenn. 548, 64 S. W. 889.

² *Monnier v. Godbold*, 116 La. 165, 40 So. 604; *Blanchard v. Burns*, *supra*.

³ *Owen v. Hill*, 67 Mich. 43, 34 N. W. 649; *Plummer v. Kennedy*, 72 Mich. 295, 40 N. W. 433; *Smith v. Hubbell*, 142 Mich. 637, 106 N. W. 547; *Alpena use of Zess v. Title G. & T. Co.*, 158 Mich. 678, 123 N. W. 536.

⁴ *Michaels v. McRoy*, 148 Mich. 577, 112 N. W. 129.

⁵ *Stephenson v. Monmouth Min. & Mfg. Co.*, 84 Fed. 114.

⁶ *Freeman v. Chanute*, 63 Kan. 573, 66 Pac. 647; *Ihk v. Duluth*, 58 Minn. 182, 59 N. W. 960; *Contra*, *Northwest Steel Co. v. Sch. Dist.*, 76 Oreg. 321, 148 Pac. 1134.

for failure to require the bond, and an improper and insufficient bond is obtained the public body is liable.¹ If public corporations are not mentioned in a statute which imposes personal liability upon an owner of property under improvement for failure to exact a good and sufficient bond from the contractor they are by implication exempted.² But where recovery is allowed none can be had unless it is shown that the contractor is insolvent. If the material man or laborer should know from the public record that a bond has been given he is chargeable with his own negligence and cannot recover against the public body.³

§ 347. Condition Precedent to Liability—Limitations.

Where a statute provides that a verified statement of claim must be filed with the public body within a certain time after the completion of the work or structure, the right to maintain an action upon the contractor's bond is made to depend upon the giving of such notice and therefore it is a condition precedent to the maintenance of the action. This provision is for the benefit of sureties, and when no claims are filed within the time limited, their liability ceases.⁴

¹ *Wilcox Lumber Co. v. Sch. Dist.*, 103 Minn. 43, 114 N. W. 262; *Scott Graff Lumber Co. v. Sch. Dist.*, 112 Minn. 474, 128 N. W. 672; *Crab Creek Lumber Co. v. Othello*, 81 Wash. 52, 142 Pac. 429.

² *Barrett Mfg. Co. v. Bd. of Comm'rs*, 133 La. 1022, 63 So. 505; *Wilcox Lumber Co. v. Sch. Dist.*, *supra*; *Contra*, *Crab Creek Lumber Co. v. Othello*, 81 Wash. 52, 142 Pac. 429; *Fransioli v. Thompson*, 55 Wash. 259, 104 Pac. 278.

³ *Woodward Lumber Co. v. Grantville*, 13 Ga. App. 405, 79 S. E. 221.

⁴ *French v. Powell*, 135 Cal. 636, 68 Pac. 92; *Huggins v. Sutherland*, 39 Wash. 552, 82 Pac. 112.

CHAPTER XLIX

LIQUIDATED DAMAGES

§ 348. General Rule.

It seems to be pretty generally recognized that these covenants and stipulations in public contracts are usually prepared by the public body and in most instances forced upon a contractor who must take them without bargaining, if he desires to be permitted to bid upon the contract. Nevertheless, if they are deliberately entered into with a full understanding of their purport, and the amount provided is not disproportionate to the actual damage or property loss suffered and is not unreasonable or oppressive, and when it is apparent that the intention of the parties was to provide compensation and nothing else, the modern tendency is to enforce them and not to construe them as a penalty, but rather to treat them as any other covenant in the contract whose true intent has been ascertained.¹ The modern rule affecting such stipulations is not to look upon them with disfavor or construe them strictly as penalties, but to look upon them with candor, if not with favor, when they are deliberately entered into between parties who have equality of opportunity for understanding and insisting upon their rights. The reason for the rule is that such stipulations promote prompt performance of contracts and adjust in advance and amicably, matters, the settlement of which through the courts would

¹ *Wise v. U. S.*, 249 U. S. 361, 63 L. Ed. 647; *Hathaway &c. Co. v. U. S.*, 249 U. S. 460, 63 L. Ed. 707, aff'g 52 Ct. Cl. 267.

involve difficulty, uncertainty, delay and expense.¹ The question whether the stipulation is to be regarded as a penalty or as liquidated damages is to be determined from a fair and reasonable construction of the contract.² When the true intention of the parties is ascertained, effect will be given to the provision as freely as to any other in the contract, as long as the actual damages are uncertain in their nature or amount or are difficult of ascertainment and as long as the amount stipulated as damages is not so extravagant or disproportionate to the actual loss as to show that compensation was not the object aimed at or as to imply fraud, mistake, circumvention or oppression.³ Each case must, of course, very obviously be determined by its own facts and circumstances.⁴ It is incumbent upon the party claiming the stipulation to be one for liquidated damages to show that it was the intelligent and deliberate purpose of the contracting parties to so consider it. But when the intention of the parties has finally been determined as well as how they regarded the provision, whether it was considered in the light of a penalty, or as liquidated damages ascertained and fixed by the agreement, such intention should ordinarily control.⁵ But if the covenant violates the tests above set forth, and by its consequences, and these seem to be the only available criteria, it shows

¹ *Wise v. U. S.*, *supra*.

² *Wise v. U. S.*, *supra*; *U. S. v. Bethlehem Steel Co.*, 205 U. S. 105, 51 L. Ed. 731; *Dist. of Columbia v. Harlan & Co.*, 30 App. D. C. 270; *Phoenix I. Co. v. U. S.*, 39 Ct. Cl. 526; *Little v. Banks*, 85 N. Y. 258, 266; *Willson v. Baltimore*, 83 Md. 203, 34 Atl. 774; *New Britian v. New Britain Tel. Co.*, 74 Conn. 326, 50 Atl. 881.

³ *Wise v. U. S.*, *supra*.

⁴ *Willson v. Baltimore*, 83 Md. 203, 34 Atl. 774; *Thompson v. St. Charles County*, 227 Mo. 220, 126 S. W. 1044.

⁵ *Graham v. Lebanon*, 240 Pa. 337, 87 Atl. 567; *U. S. v. Bethlehem Steel Co.*, *supra*; *Wise v. U. S.*, *supra*; *Pacific Hdw. Co. v. U. S.*, 49 Ct. Cl. 327, 48 Ct. Cl. 399; *Crane Co. v. U. S.*, 46 Ct. Cl. 343.

that it is a penalty, because it is oppressive, or unreasonable or that compensation was not the object which the clause was intended to fulfill and implied fraud circumvention or mistake arises, then the courts will even disregard the explicit words of the parties and treat the stipulation as a penalty.¹

§ 349. Construction of Stipulation for Liquidated Damages.

If a contract provides stipulated damages as a consequence of a breach, this is the one measure which the law will consider. Parties are free to make contracts as they see fit, and it is the duty of the courts to carry out their intention. If under the rules just considered the stipulation is in fact one which the courts can say is for specified damages, it will be enforced in that respect. The remedy which the parties themselves provide will ordinarily be exclusive and must be enforced according to its terms.² So where a contract to furnish armor and other material provides that the damage for delay shall be computed from the date set for final completion, the dates when installments become due will not be taken into account.³ If the contract provides that should the contractor fail to commence with the performance of the work on the day specified, the contract may be annulled and all money or reserve percentage due or to become due shall be forfeited, even if it is otherwise provided that the public body may relet the work, this will not give it the right to charge the contractor with the excess cost on reletting. The

¹ Willson v. Baltimore, *supra*; McClintic Marshall C. Co. v. Bd. of Freeholders, 83 N. J. Eq. 539, 91 Atl. 881.

² Stone Sand & Gravel Co. v. U. S., 234 U. S. 270, 58 L. Ed. 1308; Carnegie Steel Co. v. U. S. 240 U. S. 156, 60 L. Ed. 576, *aff'g* 49 Ct. Cl. 403; Dennis v. U. S., 5 Ariz. 313, 52 Pac. 353; Parker-Washington Co. v. Chicago, 267 Ill. 136, 107 N. E. 872.

³ Carnegie Steel Co. v. U. S., 49 Ct. Cl. 403.

remedy of the contract is exclusive and will control.¹ It may be true that such damages are inadequate, but this fact will not permit of a strained construction of or destruction of the very terms of the agreement.²

§ 350. Time of Essence—Effect of Stipulation Providing Remedy for Breach of Time Clause.

Where a contract expressly determines the consequences of a failure to begin or complete work on time, time cannot be considered of the essence. The inherent right of annulment and the consequent right to recover all damages as for a complete breach arise out of the common law. If the parties elect to deal with the matter by express stipulation that is the end of it. It may very well be that time is made vital, but if the contract provides also for the consequences of a breach the benefits and burdens of the contract must be taken together. Common-law rights of annulment must give way to express provisions covering that right. Time of the essence becomes of no moment where the contract gives the mode of redress for a failure of observance of time, except to give the relief which the contract provides.³

§ 351. Money Contracts.

The rules governing the payment of liquidated damages do not apply to contracts calling only for the payment of money. Such a contract, if broken, is fully satisfied by payment of legal interest as damages during the period of delay or for the breach. Therefore any agreement to forfeit or pay a larger sum because of a default in the pay-

¹ *Stone Sand & Gravel Co. v. U. S.*, 234 U. S. 270, 58 L. Ed. 1308.

² *Idem.*

³ *Idem.*

ment of a lesser amount will be considered a penalty which no form of words will convert into liquidated damages.¹

§ 352. When Provision is not Considered a Penalty.

If the damages are at all uncertain or difficult of ascertainment the parties should have the right to anticipate, stipulate and settle them, if they so choose, and their true intent in this respect should be enforced. If the sum is not greatly disproportionate to the actual damage suffered and is required to be paid for each default, or per diem, or otherwise periodically during the default it will be considered liquidated damages.² But if it is wholly disproportionate to the actual damage, no matter what the method of computation, it will be treated as a penalty.³ If the contract provides for payments in installments as the work progresses and for the retaining of a certain percentage of each installment as security for full performance, the provision will not be treated as liquidated damages but rather as a penalty.⁴ To construe such a provision as one fixing and settling the damage would more often work injustice than fairness since the nearer the completion of the work,

¹ *Parker-Washington Co. v. Chicago*, 267 Ill. 136, 107 N. E. 872; *Graham v. Lebanon*, 240 Pa. St. 337, 87 Atl. 567; *Loudon v. Taxing District*, 104 U. S. 771.

² *Heard v. Dooley County*, 101 Ga. 619, 28 S. E. 986; *Ludlow Valve Mfg. Co. v. Chicago*, 181 Ill. App. 388; *Thompson v. St. Charles County*, 227 Mo. 220, 126 S. W. 1044; *Summit v. Morris County T. Co.*, 85 N. J. L. 193, 88 Atl. 1048; *White v. Braddock Boro. S. D.*, 159 Pa. 201, 28 Atl. 136; *Harris County v. Donaldson*, 20 Tex. Civ. App. 9, 48 S. W. 791; *Malone v. Philadelphia*, 147 Pa. 416, 23 Atl. 628; *Stephens v. Essex Pk. Comm.*, 143 Fed. 844; *Madison v. Amer. San. Eng. Co.*, 118 Wis. 480, 95 N. W. 1097.

³ *McCann v. Albany*, 11 App. Div. 378, 158 N. Y. 634, 53 N. E. 673; *Haliday v. U. S.*, 33 Ct. Cl. 453.

⁴ *Pigeon v. U. S.*, 27 Ct. Cl. 167; *Davis v. U. S.*, 17 Ct. Cl. 201; *Kennedy v. U. S.*, 24 Ct. Cl. 122; *Satterlee v. U. S.*, 30 Ct. Cl. 31; *Haliday v. U. S.*, *supra*; *Smith v. U. S.*, 34 Ct. Cl. 472; *Phoenix I. B. Co. v. U. S.*, 39 Ct. Cl. 526; *Mundy v. U. S.*, 35 Ct. Cl. 265; *Hughes v. U. S.*, 45 Ct. Cl. 517.

the less the damage and the greater the sum retained, while if default occur shortly after the work begins, the greater would be the damage and the less the retained percentage with which to satisfy it. Such a result negatives an intention to liquidate damages, especially where the right is reserved to recover damages in addition to the sums retained.¹

§ 353. Where Character of Clause is Doubtful—Doubt as to Amount to be Paid.

If the clause under consideration as a stipulated damage clause creates a doubt as to whether the provision should be construed as a penalty or as liquidated damages, the courts will regard it as a penalty.² The general rule is that whether the amount stated is denominated as “liquidated damages” or as a “penalty,” it is not conclusive and if the contract leaves the intention of the parties in doubt as to the amount to be paid for its breach, or the amount specified is beyond all reasonable proportion to the damages that may actually be sustained, the contract will be construed as a penalty only and not as liquidated damages, though it be specified as such.³ In case the clause is thus treated as a penalty, only actual damages are recoverable.⁴

¹ *Hughes v. U. S.*, 45 Ct. Cl. 517. See *Stone Sand & Gravel Co. v. U. S.*, 234 U. S. 270, 58 L. Ed. 1308.

² *Parker-Washington Co. v. Chicago*, 267 Ill. 136, 107 N. E. 872; *Willson v. Baltimore*, 83 Md. 203, 34 Atl. 774; *Thompson v. St. Charles County*, 227 Mo. 220, 126 N. W. 1044; *Moore v. Platte County*, 8 Mo. 467; *Phoenix I. Co. v. U. S.*, 39 Ct. Cl. 526; *United Eng., etc., Co. v. U. S.*, 47 Ct. Cl. 489, aff'd 234 U. S. 236, 58 L. Ed. 1294.

³ *U. S. v. Bethlehem Steel Co.*, 205 U. S. 105, 51 L. Ed. 731; *Willson v. Baltimore*, *supra*; *Lamson v. Marshall*, 133 Mich. 250, 95 N. W. 78; *Salem v. Anson*, 40 Oreg. 339, 67 Pac. 190, 56 L. R. A. 169.

⁴ *Parker-Washington Co. v. Chicago*, *supra*; *Thompson v. St. Charles County*, *supra*; *Illinois Surety Co. v. U. S.*, 229 Fed. 527; *Pacific Hardware Co. v. U. S.*, 49 Ct. Cl. 327, s. c. 48 Ct. Cl. 399.

§ 354. Effect of Calling Clause "Liquidated Damages."

In determining the question of whether a clause for settled damages shall be treated and regarded as a penalty, the form of instrument will not control; the intention of the parties is to be ascertained and will govern, for the courts look beyond the mere form of the instrument to the subject of contract and to the consequences which will probably flow from a breach of its terms and conditions. The mere calling of the clause a "liquidated damage" clause and asserting that it is not a penalty, will not alone guide the courts in deciding this question. Such language is not conclusive when the clause itself in its results violates the reasonable limitations heretofore described.¹

§ 355. Where Subject-Matter of Contract is of Uncertain Value.

Where the subject-matter of the contract is of uncertain value or the damages to be paid for its breach are incapable of definite ascertainment by any fixed rule, the amount stipulated in the damage clause will be construed as settled or liquidated damages. The facts of each particular case must be considered to ascertain whether a particular case comes within this rule.²

§ 356. Contract Containing Several Distinct and Independent Covenants.

If the agreement contains several distinct and independent covenants of which there may be several breaches, and one sum is stated to be paid upon breach of perform-

¹ *Willson v. Baltimore*, 83 Md. 203, 34 Atl. 774; *Ward v. Hudson R. B. Co.*, 125 N. Y. 230, 26 N. E. 256; *Caesar v. Robinson*, 174 N. Y. 492, 67 N. E. 58; *Chicago House Wrecking Co. v. U. S.*, 106 Fed. 385. See *Seidlitz v. Auerbach*, 230 N. Y. 167, 129 N. E. 461.

² *Thompson v. St. Charles County*, 227 Mo. 220, 126 S. W. 1044.

ance, that sum is to be regarded as a penalty and not as liquidated damages.¹ In like manner where there are several undertakings or agreements in a contract of different degrees of importance and the damages for the non-performance of some of these is readily ascertainable and for others not, or the loss resulting from the breach of some of these is clearly disproportionate to the sum sought to be fixed as liquidated damages, and one sum is named as damages for a breach of any of these covenants, such sum will be regarded as a penalty only and will not be treated as liquidated damages for the breach of any single stipulation.² This rule is based upon the fact that breaches may vary in the extent of resulting damage, since each act performed is not usually of equal importance. One stated sum, therefore, could not reasonably have been indicated to cover any of these breaches of varying consequences. If this result, which the courts reach is to be obviated, it can only be overcome by providing a separate sum to be paid upon each separate breach. Of course, if it is apparent that the contract clause for stipulated damages relates to the performance of a single act or condition, this fact will aid the court in determining whether it was the intention of the parties to liquidate and settle the damages rather than provide a penalty.³

§ 357. When Courts Will Regard the Provision as a Penalty.

Whenever it is apparent that the damages or loss

¹ *Lampman v. Cochran*, 16 N. Y. 275; *Thompson v. St. Charles County*, 227 Mo. 220, 126 S. W. 1044.

² *Parker-Washington Co. v. Chicago*, 267 Ill. 136, 107 N. E. 872; *Daily v. Litchfield*, 10 Mich. 29; *Summit v. Morris County Traction Co.*, 85 N. J. L. 193, 88 Atl. 1048; *Elyria v. Cleveland, etc., R. Co.*, 23 Ohio Cir. Ct. n. s. 578; *Madison v. American San. Eng. Co.*, 118 Wis. 480, 95 N. W. 1097; *Madler v. Silverstone*, 55 Wash. 159, 104 Pac. 165, 34 L. R. A. n. s. 1.

³ *Low v. Redditch Local Board*, 1 Q. B. 127.

suffered are easy of ascertainment, the courts will incline to regard the clause for stipulated or settled damages, as a penalty.¹ The difficulty in ascertaining the damages suffered, is given great weight in determining whether the clause should be regarded as a penalty or as one providing for liquidated damages.² The courts incline toward treating it as liquidated damages in proportion to the degree of difficulty in ascertaining the actual damages, but where the amount of damages provided in the stipulation is unconscionable, it will be regarded as a penalty.³ And where the sum provided is unreasonable in comparison with the actual damages or loss suffered, it will be treated as a penalty.⁴ When the amount is out of all proportion to the actual damages suffered, the courts look upon it as a penalty to guarantee the performance and not as liquidated damages.⁵ It seems to be equally well settled that when a sum, if it be at all reasonable, is stipulated to be paid as liquidated damages for the breach of a contract, it will be regarded as such and not as a penalty where from the nature of the covenant the damages arising from its

¹ *Nevada County v. Hicks*, 38 Ark. 557; *Willson v. Baltimore*, 83 Md. 203, 34 Atl. 774; *Thompson v. St. Charles County*, 227 Mo. 220, 126 N. W. 1044; *St. Louis v. Parker-Washington Co.*, 271 Mo. 229, 196 S. W. 767; *Davis v. U. S.*, 17 Ct. Cl. 201; *Smith Co. v. U. S.*, 34 Ct. Cl. 472.

² *People v. Love*, 19 Cal. 676; *Parker-Washington Co. v. Chicago*, 267 Ill. 136, 107 N. E. 872; *Ferber Con. Co. v. Bd. of Ed. of Hasbrouck Heights*, 90 N. J. L. 193, 100 Atl. 329; *Peekskill, etc., R. Co. v. Peekskill*, 21 App. Div. 94, 165 N. Y. 628, 59 N. E. 1128; *Malone v. Philadelphia*, 147 Pa. St. 416, 23 Atl. 628; *Davis v. U. S.*, 17 Ct. Cl. 201, 215; *Phoenix I. Co. v. U. S.*, 39 Ct. Cl. 526; *Maryland Dredging Co. v. U. S.*, 241 U. S. 184, 60 L. Ed. 945, aff'g 49 Ct. Cl. 710; *U. S. v. U. S. Bethlehem S. Co.*, 205 U. S. 105, 51 L. Ed. 731.

³ *Salem v. Anson*, 40 Oreg. 339, 67 Pac. 190, 56 L. R. A. 169; *Davis v. U. S.*, 17 Ct. Cl. 201; *Haliday v. U. S.*, 33 Ct. Cl. 453; *Edgar v. U. S.*, 34 Ct. Cl. 205; *Smith Co. v. U. S.*, 34 Ct. Cl. 472.

⁴ *Davin v. Syracuse*, 69 Misc. 285, 145 N. Y. App. Div. 904; *Cleveland v. Connelly*, 33 Ohio Cir. Ct. 64; *Davis v. U. S.*, 17 Ct. Cl. 201.

⁵ *Smith v. Copiah County*, 239 Fed. 425, aff'd 239 Fed. 432; *McCann v. Albany*, 11 N. Y. App. Div. 378, 158 N. Y. 634, 53 N. E. 673.

breach are wholly uncertain and cannot be ascertained.¹ It has been said, however, that it is neither excessive nor exorbitant to fix twenty five dollars per day as damages for failure to deliver scows costing under the contract in excess of ten thousand dollars.²

§ 358. Bond Given to Promote a Public Interest.

It often-time happens that where franchises are conferred by a municipal corporation or by the government itself, a bond is required to secure the construction of the public work which is to be operated in exercise of the franchise. The condition of the bond generally is that if the construction is not fulfilled by a stated date, the bond is declared forfeited, although no pecuniary damages may be shown to be sustained by the government or its subdivisions. A distinction is made in these cases between private obligations and bonds given to the sovereign or its agent for the purpose of promoting a public interest or policy. In the latter instance there would be no intention to indemnify for the reason that the state can gain nothing in its political or sovereign character by the performance of the condition of the bond, or lose anything by default. If a municipality or the state or nation requires as a condition of the making of a contract for sale of franchises, the payment of a fixed sum in liquidated damages, the sum becomes forfeited in case the utility is not constructed and put into operation by the time limited in the contract. The reason for this rule is that the obligors become bound because of a penalty or forfeiture inflicted by the sovereign power for breach of its laws. Security is taken

¹ Willson v. Baltimore, *supra*; New Britain v. New Britain Telephone Co., 74 Conn. 326, 50 Atl. 881, 1015.

² Ellicott Machine Co. v. U. S., 43 Ct. Cl. 232.

before the offense is committed and retained upon its commission.¹

**§ 359. When Provision Will not be Considered a Penalty—
Deposit Money.**

Where in order to enter into a contract or make a proposal the public body requires a deposit to accompany the proposal for the performance of the proposal, and provides that in case the bidder fails to execute a contract the deposit shall be retained by the public body, this is usually considered as an intention to liquidate damages and the deposit will be so considered.² If a public body suffers no loss from the failure of the prospective contractor to carry out his bid, the public body will be required to repay the deposit even though the bidder's stipulation was that it should be retained as liquidated damages.³ Where it appears from the surrounding circumstances that the deposit is in the nature of a penalty it may be enforced only to the extent of actual loss suffered by the public body from failure to enter into the contract.⁴ When no loss is suffered by the public body or a loss less than the amount of the deposit, the whole amount of the deposit or such balance as the contractor is entitled to,

¹ *Clark v. Barnard*, 108 U. S. 436, 27 L. Ed. 780; *U. S. v. Montell*, 26 Fed. Cases No. 15798; *Nilson v. Jonesboro*, 57 Ark. 168, 20 S. W. 1093; *Brooks v. Wichita*, 114 Fed. 297; *Fiscal Ct. v. Ky. Public Service Co.*, 204 S. W. (Ky.) 77; *Salem v. Anson*, 40 Oreg., 339, 67 Pac. 190, 56 L. R. A. 169; *Peekskill, etc., R. Co. v. Peekskill*, 21 N. Y. App. Div. 94, 165 N. Y. 628, 59 N. E. 1128; *Grants Pass v. Rogue River Pub. Serv. Corp.*, 87 Oreg. 637, 171 Pac. 400; *York v. York Rys. Co.*, 229 Pa. St. 236, 78 Atl. 128.

² *Wheaton Bldg. & L. Co. v. Boston*, 204 Mass. 218, 90 N. E. 598; *Coonan v. Cape Girardeau*, 149 Mo. App. 609, 129 S. W. 745; *Davin v. Syracuse*, 69 Misc. 285, 145 N. Y. App. Div. 904; *Hattersly v. Waterville*, 16 Ohio Cir. Ct. 226; *Turner v. Fremont*, 159 Fed. 221; *Morgan Park v. Gahan*, 136 Ill. 515, 26 N. E. 1085.

³ *Graham v. Lebanon*, 240 Pa. St. 337, 87 Atl. 567.

⁴ *Willson v. Baltimore*, 83 Md. 203, 34 Atl. 774.

may be recovered.¹ But the fact that a city relets a contract to another bidder without re-advertising, will not have the effect of entitling the bidder to the return of his deposit where he fails to enter into the contract.² A check deposited for a stated purpose that it shall be as a surety for the making and execution of a contract, cannot be treated as liquidated damages. It is rather in the nature of an obligation to reimburse or compensate the actual loss resulting from a default.³

§ 360. Provisions for Payment in Event of Delay.

Where a public contractor fails to complete his work on time under a contract which contains a provision for the payment of certain moneys in the event of his failure to perform on time, such provision, if reasonable, is looked upon usually as one for liquidated damages and not as a penalty.⁴ The reason for such rule is based upon the uncertainty of estimating the damages which a public body would suffer from such delay.⁵ The rule is especially adaptable to contracts for the construction of large public works, where the reason for the rule appropriately applies.⁶

¹ *Lindsey v. Rockwall County*, 10 Tex. C. A. 225, 30 S. W. 380; *Graham v. Lebanon*, *supra*.

² *Turner v. Fremont*, *supra*.

³ *Barber Asphalt Paving Co. v. St. Paul*, 136 Minn. 396, 162 N. W. 470, L. R. A. 1917 E. 370.

⁴ *Lincoln v. Little Rock Granite Co.*, 56 Ark. 405, 19 S. W. 1056; *Mayor, etc., of Jersey City v. Flynn*, 74 N. J. Eq., 104, 70 Atl. 497; *Macey Co. v. New York*, 144 N. Y. App. Div. 408, 208 N. Y. 514, 101 N. E. 1110; *Malone v. Philadelphia*, 147 Pa. St. 416, 23 Atl. 628.

⁵ *Malone v. Philadelphia*, *supra*; *Heard v. Dooly County*, 101 Ga. 619, 28 S. E. 986.

⁶ *Lawrence County v. Stewart*, 72 Ark. 525, 81 S. W. 1059; *Heard v. Dooly County*, *supra*; *Winston v. Pittsfield*, 221 Mass. 356, 108 N. E. 1038; *Thompson v. St. Charles County*, 227 Mo. 220, 126 S. W. 1044; *McClintic-Marshall Con. Co. v. Hudson County*, 83 N. J. Eq. 539, 91 Atl. 881; *Malone v. Philadelphia*, *supra*; *Stephens v. Essex Co. Pk. Comm.*, 143 Fed. 844; *Morris v. U. S.* 50 Ct. Cl. 154; *Link Belt Eng. Co. v. U. S.*, 142 Fed. 243; *Motschman v. U. S.*, 47 Ct. Cl. 373; *Baltimore v. Ault*, 126 Md. 402, 94 Atl. 1044; *Whiting v. New Baltimore*, 127 Mich. 66, 86 N. W. 403.

Municipal, state and national contracts usually provide that a stated sum for each day's delay shall be paid by the contractor to the public body. Where the amount to be retained by the public body is out of all proportion to the damage,¹ or where the intention of the parties and the surrounding circumstances indicate a different character to the stipulation, it will not be regarded as one for liquidated damages, but rather as a penalty.² When the actual loss and damage can be shown the provision will be treated as a penalty.³ In like manner if the contract provides that in case of annulment the retained percentages are to be treated as forfeited, such a clause will be regarded as imposing a penalty.⁴ But these provisions for forfeiture of certain amounts in case of delay, do not apply to delays for which the contractor has an excuse, as where the delay was caused by the public body.⁵ No forfeiture of the amount stipulated as liquidated damages can be effected, where a public work contracted for is not completed in time, if the warrants drawn on the state treasurer and delivered to the contractor, are not paid and his real reason for delay is that he cannot proceed because of lack of funds with which to pay labor and purchase materials.⁶ If the initial delay was caused by the Government it cannot recover liquidated damages where the work was later completed, but there was also some delay by the contractor.⁷ This is true, although the con-

¹ *Moore v. Platte County*, 8 Mo. 467.

² *McCann v. Albany*, 11 N. Y. App. Div. 378, 158 N. Y. 634, 53 N. E. 673.

³ *Smith Co. v. U. S.*, 34 Ct. Cl. 472.

⁴ *Satterlee v. U. S.*, 30 Ct. Cl. 31.

⁵ *U. S. v. United Eng., etc., Co.*, 234 U. S. 236, 58 L. Ed. 1294, aff'g 47 Ct. Cl. 489; *Morris v. U. S.*, 50 Ct. Cl. 154.

⁶ *Landry v. Peytavin*, 7 Mart. (La.) 165.

⁷ *U. S. v. United Eng., etc., Co.*, 234 U. S. 236, 58 L. Ed. 1294, aff'g 47 Ct. Cl. 489; *Ittner v. U. S.*, 43 Ct. Cl. 336.

tractor unreasonably delays his completion, if prior to such delay the conduct of the Government prevented, by its delay, a strict performance.¹ In such a situation, the stipulation for damages is not revived against the contractor.² Where both parties are in fault, the same rule applies,—the stipulation for liquidated damages is no longer binding.³ But the courts will undertake to apportion the damage where the contract provides that it shall be apportioned and impose damages on the contractor for such delays as are chargeable to him.⁴ These stipulations do not apply where a contractor completely abandons the work, but only in cases where he finishes it.⁵ When the public body completes the work it may not claim the amount stipulated in the contract as liquidated damages.⁶ Where the delay is occasioned by extra work, if there is no provision in the contract to cover this class of work and hold the contractor to finish all of his work, including the extra work, within the time limited by the contract, a direction by the public body to perform extra work will operate to make the clause for stipulated damages inapplicable.⁷ The general rule seems to be that where the parties are mutually responsible for the delay, by reason of which the date limited by the contract for its completion has passed, the obligation of the stipulation relating to liquidated damages is destroyed and unless the contract

¹ *Idem.*

² *U. S. v. United Eng., etc., Co., supra*; *Ittner v. U. S.*, 43 Ct. Cl. 336; *Dist. of Col. v. Camden Iron Works*, 15 App. D. C. 198.

³ *U. S. v. United Eng., etc., Co., supra*; *Gustavino Co. v. U. S.*, 50 Ct. Cl. 115.

⁴ *Schmulbach v. Caldwell*, 196 Fed. 16; *Van Buskirk v. Passaic Bd. of Ed.*, 78 N. J. L. 650, 75 Atl. 909.

⁵ *Moore v. Bd. of Regents*, 215 Mo. 705, 115 S. W. 6; *Clarke & Sons v. Pittsburgh*, 146 Fed. 441, 154 Fed. 464; *Gallagher v. Baird*, 54 N. Y. App. Div. 398, 170 N. Y. 566, 62 N. E. 1095.

⁶ *Moore v. Dis., etc., Bd. of Regents*, 215 Mo. 705, 115 S. W. 6.

⁷ *Gammino v. Dedham*, 164 Fed. 593.

provides in some manner for the substitution of another date, the stipulation cannot be revived and is not effective under the contract.¹

§ 361. The Measure Provided by the Contract Controls.

Where the parties to a public contract provide by its terms a measure of damages, to be effective in the event of its breach, the agreement of the parties in this respect will ordinarily be enforced.² When the contract contemplates the likelihood of its cancellation and the power to cancel is reserved and an indemnity agreed upon as the amount to be paid for cancelling the contract, this will be taken by the courts as a measure of damages for illegally refusing to award the contract.³ It is never necessary to give proof of actual damages in order to recover the amount fixed by the agreement as liquidated damages.⁴ It will be presumed that some damages are suffered in a case where the clause of the contract providing for liquidated damages has appropriate application.⁵ The amount fixed will not be increased by adding interest.⁶

§ 362. Waiver.

Whenever the parties to a contract provide time to be of the essence and stipulate for damages in the event that the contract is not completed in time, this provision may be waived, and an extension of the time to complete the contract will operate to waive the stipulation relating to

¹ *Mosler Safe Co. v. Maiden Lane S. D. Co.*, 199 N. Y. 499, 93 N. E. 81.

² *Dennis v. U. S.*, 5 Ariz. 313; *Chicago v. Sexton*, 115 Ill. 230, 2 N. E. 263.

³ *Garfield v. U. S.*, 93 U. S. 242, 23 L. Ed. 779.

⁴ *Salem v. Anson*, 40 Oreg. 339, 67 Pac. 190, 56 L. R. A. 169; *U. S. v. Dieckhoff*, 202 U. S. 302, 50 L. Ed. 1041; *Ellicott Machine Co. v. U. S.*, 43 Ct. Cl. 232.

⁵ *Davin v. Syracuse*, 69 Misc. 285, 145 N. Y. App. Div. 904.

⁶ *Kinser Const. Co. v. State*, 125 N. Y. Supp. 46.

damages. By being waived it becomes eliminated from the contract and no longer entitles the party in whose favor it is written to recover liquidated damages.¹ The clause will not be revived even to cover an unreasonable delay. When a contractor agrees to do a piece of work within a given time and the parties have stipulated a fixed sum, it is not disproportionate as liquidated damages. The other party, to enforce such payment, cannot prevent the performance of the contract within the stipulated time. If he does, even though there was further delay by the fault of the contractor, the rule of the original contract relating to liquidated damages becomes waived and annulled.² Once waived the clause cannot be revived in the absence of express provision of the contract.³

§ 363. Relief in Equity from Clause.

Where a provision in a contract provides for liquidated damages and there is real and substantial damage suffered and its admeasurement is so difficult that an agreed sum is not only fair but practically necessary, equity will leave the parties to their legal rights and will not grant relief against such a clause unless the amount fixed is so disproportionate to actual damages as to be unconscionable and to justify a finding that the formal agreement as to damages was a mere pretense to annul the doctrine of equitable relief.⁴

¹ Maryland Steel Co. v. U. S., 235 U. S. 451, 59 L. Ed. 312; Stroebel Steel Co. v. Chicago San. Dist., 160 Ill. App. 554.

² U. S. v. United Eng., etc., Co., 234 U. S. 236, 58 L. Ed. 1294, aff'g 47 Ct. Cl. 489.

³ U. S. v. United Eng., etc., Co., *supra*; Maryland Steel Co. v. U. S. *supra*; Dist. of Col. v. Harlan, etc., Co., 30 App. D. C. 270; Camden I. Wks. v. New Orleans Sew. Bd., 141 La. 453, 75 So. 204; Wight v. Chicago, 137 Ill. App. 240, 234 Ill. 83, 84 N. E. 628.

⁴ U. S. v. Rubin, 227 Fed. 938.

CHAPTER L

LIMITATIONS TO SUITS ON PUBLIC CONTRACTS

§ 364. **Liability of Government and its Sub-Divisions to Suit.**

The United States has power to make contracts¹ and may be liable in many ways on implied contracts.² The power to make contracts is an incident to sovereignty, in order to accomplish the objects of government.³ When the nation or the state thus enters into a contract it lays aside its robe as sovereign and becomes bound by the same obligations as an individual and its contracts are governed by the same laws.⁴

But while the nation and the state may thus make contracts, neither can be sued⁵ without consent on its part. And even after it has agreed that it may be sued the sovereign may defeat suit by failing to make an appropriation to pay the contract debt.⁶ Where a municipality has power to make contracts, hold property and exercise the

¹ *U. S. v. Rubin*, 227 Fed. 938.

² *U. S. v. Russell*, 16 Wall., 80 U. S. 623, 20 L. Ed. 474, aff'g 5 Ct. Cl. 121; *U. S. v. Great Falls Mfg. Co.*, 112 U. S. 645, 28 L. Ed. 846, aff'g 16 Ct. Cl. 160; *Dooley v. U. S.*, 182 U. S. 222, 45 L. Ed. 1074; *U. S. v. Lynah*, 188 U. S. 445, 47 L. Ed. 539.

³ *Dugan v. U. S.*, 3 Wheat, (U. S.) 172, 4 L. Ed. 362; *Van Brocklin v. Tennessee*, 117 U. S. 151, 29 L. Ed. 845; *Moses v. U. S.*, 166 U. S. 571, 41 L. Ed. 1119, aff'g 3 App. D. C. 277; *Dickson v. U. S.*, 125 Mass. 311.

⁴ *Ohio Life Ins., etc., Co. v. Debolt*, 16 How. (U. S.) 416, 14 L. Ed. 997; *Davenport v. Buffington*, 97 Fed. 234; *Patton v. Gilmer*, 42 Ala. 548, 94 Am. Dec. 665; *Chapman v. State*, 104 Cal. 690, 38 Pac. 457; *Carr v. State*, 127 Ind. 204, 26 N. E. 778; *Indiana v. Woram*, 6 Hill 33, 40 Am. Dec. 378; *People ex rel. Graves v. Sohmer*, 207 N. Y. 450, 101 N. E. 164; *Cleveland Term'l, etc., R. Co. v. State*, 85 Ohio St. 251, 97 N. E. 967.

⁵ *County of Albany v. Hooker*, 204 N. Y. 1, 97 N. E. 403; *Cayuga Co. v. State*, 183 N. Y. Supp. 646.

⁶ *Carr v. State*, 127 Ind. 204, 26 N. E. 778.

power to tax, there arises in its favor the right to sue and against it the right to be sued.¹ Mere territorial subdivisions or boards which do not constitute a municipal corporation proper can neither be sued nor sue, unless the legislature expressly permits it.²

§ 365. Venue of Actions.

Actions against a municipal corporation must be brought in the county where it is situated³ and if it is located in several counties, its principal office or place of business is in the county where its principal seat of government is located.⁴ In New York certain municipal corporations are domestic corporations and are accordingly controlled by the general corporation law which fixes the venue of suits against domestic corporations.⁵ It is implied in New York that the legislature has conferred upon every city in that state the attribute of residence in that county in which its principal place of business is located, so far as residence controls the jurisdiction of county courts.⁶

§ 366. Condition Precedent to Suit—Necessity to Present Notice of Claim.

The legislature possesses power to enact statutes imposing as a condition precedent to suit the filing of a notice of claim with the common council, financial, law or other

¹ *McCloud v. Selby*, 10 Conn. 390, 27 Am. Dec. 689; *Anne Arundel Co. v. Duckett*, 20 Md. 468, 83 Am. Dec. 557.

² *Hunsaker v. Borden*, 5 Cal. 288, 63 Am. Dec. 130.

³ *St. Louis v. Wiggins Ferry Co.*, 11 Wall. (U. S.) 423, 429, 20 L. Ed. 192; *Phillips v. Baltimore*, 110 Md. 431, 72 Atl. 902; *Piercey v. Johnson City*, 130 Tenn. 231, 169 S. W. 765, L. R. A. 1915 F. 1029; *Marshall v. Kansas City*, 95 Kan. 548, 148 Pac. 637; L. R. A. 1915 F. 1025.

⁴ *Maisch v. New York*, 193 N. Y. 460, 86 N. E. 458; *Fostoria v. Fox*, 60 Ohio St. 340, 54 N. E. 370; *Arlington v. Calhoun*, 148 Ga. 132, 95 S. E. 991.

⁵ *Maisch v. New York*, *supra*; *Eldred v. New York*, 159 N. Y. App. Div. 301.

⁶ *Maisch v. New York*, *supra*.

officer of the city, and providing that no action may be maintained against the municipality until the claimant shall so present written notice of his claim containing a statement and the amount thereof duly verified, and it may prescribe a limit of time within which such claim may be presented.¹ Statutes of this sort passed by the legislature will be upheld, notwithstanding that such requirements did not exist at common law, as long as they are not unreasonable. They fall naturally into two classes depending upon the language and intent thereof as shown by the statute. One class is a statutory condition of the right, which imposes a condition of the very existence of the right and so is a condition precedent to any suit being maintained at all upon the contract. The other class creates a statute of limitations which acts on the remedy only and to be availed of must be pleaded and taken advantage of by demurrer or answer and if not so taken it may be waived. In this latter case the right of suit on the contract is independent of the statute. The enforcement of the right is regulated and limited. In the former class, the failure to give the notice and comply with the statute prevents the right of action from springing into being and failure to comply with the condition need not be pleaded and cannot be waived. Many of the statutes go to the extent of requiring the claimant to plead and prove the giving of the notice as part of his cause of action.² Where

¹ *O'Connor v. Fond DuLac*, 109 Wis. 253, 53 L. R. A. 831; *Cunningham v. Denver*, 23 Colo. 18, 45 Pac. 356; *Ada Co. v. Bullen Br. Co.*, 5 Idaho, 188 47 Pac. 818, 36 L. R. A. 372; *Miller v. Mullan*, 17 Idaho 28, 104 Pac. 660, 32 L. R. A. n. s. 350; *Schigley v. Waseca*, 106 Minn. 94, 118 N. W. 259, 19 L. R. A. n. s. 689; *Frasch v. New Ulm*, 130 Minn. 41, 153 N. W. 121, L. R. A. 1915 E. 749; *MacMullen v. Middletown*, 187 N. Y. 37, 79 N. E. 863; 11 L. R. A. n. s. 391; *Winter v. Niagara Falls*, 190 N. Y. 198, 82 N. E. 1101; *Cole v. Seattle*, 64 Wash. 1, 34 L. R. A. n. s. 1166; *Hase v. Seattle*, 51 Wash. 174, 98 Pac. 370; *Collins v. Spokane*, 64 Wash. 153, 116 Pac. 663, 35 L. R. A. n. s. 840.

² *Winter v. Niagara Falls*, 190 N. Y. 198, 82 N. E. 1101.

the statute requires that claimant shall present his claim within a stated period and he fails to do so, this operates under some statutes to extinguish the claim.¹ These statutes being derogatory of the common law are strictly construed and not extended beyond their fair purport or so as to include other cases than those expressed. Conformable to such principle the "claim" or "demand" of which a notice must be filed does not include a tort.² And it has also been determined that these statutes only apply to actions brought in the State Courts and have no application where suit is laid in the Federal Courts.³ But a person having a claim against a county has the option of presenting it for audit or of suing upon it directly.⁴ The presentation of an itemized, verified bill for audit, thirty days before action brought, is a condition precedent to the right to sue, and must be pleaded to be available. The failure of the public body to return an unverified statement of account, or to make objection on that ground is not a waiver of the defect.⁵

§ 367. Effect of Allowance or Rejection of Claim.

Municipalities, in passing on these claims thus presented to them under statutes referred to, act in a merely executive capacity and the allowance of the claim is not conclusive, as it would be if the board acted in a judicial capacity. Accordingly municipalities are not estopped by the allowance of the claim but, like every similar act of an individual or corporation, it is to be taken as an admission,

¹ *Hay v. Baraboo*, 127 Wis. 1, 105 N. W. 654, 3 L. R. A. N. s. 84.

² *Shields v. Durham*, 118 N. C. 450, 24 S. E. 794, 36 L. R. A. 293; *McGaffin v. Cohoes*, 74 N. Y. 387, 30 Am. R. 307.

³ *Gamewell Fire Alarm Co. v. Mayor*, 31 Fed. 312.

⁴ *N. Y. Cath. Protectory v. Rockland Co.*, 212 N. Y. 311, 106 N. E. 80; *Delano v. Suffolk Co.*, 192 N. Y. App. Div. 459, 229 N. Y. 610, 129 N. E. 928.

⁵ *Comm. Water Co. v. Castleton*, 192 N. Y. App. Div. 697; *Cottriss v. Medina*, 139 N. Y. App. Div. 872, 206 N. Y. 713, 99 N. E. 1105.

which however is rebuttable; and it can later be shown that the allowance was made without a full knowledge of all the circumstances or that it was incorrectly or imprudently allowed.¹ If the board charged with the duty of passing on the claim, allows a claim which is illegal or one which a court will not enforce, such action can have no effect. The governing body or other board of a municipality have no power or ability to give validity to a claim which it otherwise did not possess.² Where a claim is once passed on it cannot be reconsidered.³

§ 368. Rights and Remedies Available to Public Bodies.

Public bodies may, for the purpose of protecting their property, and in general in the transaction of business of a private character, avail themselves of all the rights and remedies afforded to an individual.⁴ Where a contract specifically provides for the consequences of its breach the remedy thus provided is exclusive.⁵ The usual measure of damages is compensation which will make the hurt party whole, as nearly as is possible, and this rule applies alike to public and private contracts.⁶ But the contractor is not limited to suit upon the contract since he may also sue on assumpsit for the amount due under the contract.⁷

¹ *Huntington County v. Heaston*, 144 Ind. 583, 41 N. E. 457; *Jackson County v. Nichols*, 12 Ind. App. 315, 40 N. E. 277; *Clark v. Des Moines*, 19 Iowa, 199, 87 Am. Dec. 423; *State v. Minden*, 84 Neb. 193, 120 N. W. 913; *People v. Buffalo*, 140 N. Y. 300, 35 N. E. 485.

² *Berka v. Woodward*, 125 Cal. 119, 57 Pac. 777; *Huntington Co. v. Heaston*, *supra*.

³ *McConaughy v. Jackson*, 101 Cal. 265, 35 Pac. 863, 40 Am. St. Rep. 53; *Re Equit. T. Co. v. Hamilton*, 226 N. Y. 241, 123 N. E. 380.

⁴ *Buffalo v. Bettinger*, 76 N. Y. 393; *Buffalo Cement Co. v. McNaughton*, 90 Hun, 74, 156 N. Y. 702, 51 N. E. 1089.

⁵ *Mechanic's Bank v. New York*, 164 N. Y. App. Div. 128.

⁶ *Newport v. Newport L. Co.*, 17 Ky. L. R. 31, 30 S. W. 606.

⁷ *Bigelow v. Perth Amboy*, 25 N. J. L. 297; *Charlotte v. Atlantic Bitulithic Co.*, 228 Fed. 456.

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